

**Federalism and the Australian Offshore Constitutional Settlement**

**by**

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This thesis contains no material which has been accepted for the award of any other degree or diploma in any tertiary institution and that, to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

A handwritten signature in black ink, appearing to read 'M. Haward', written over a horizontal dotted line.

Marcus Haward

## Federalism and the Australian Offshore Constitutional Settlement

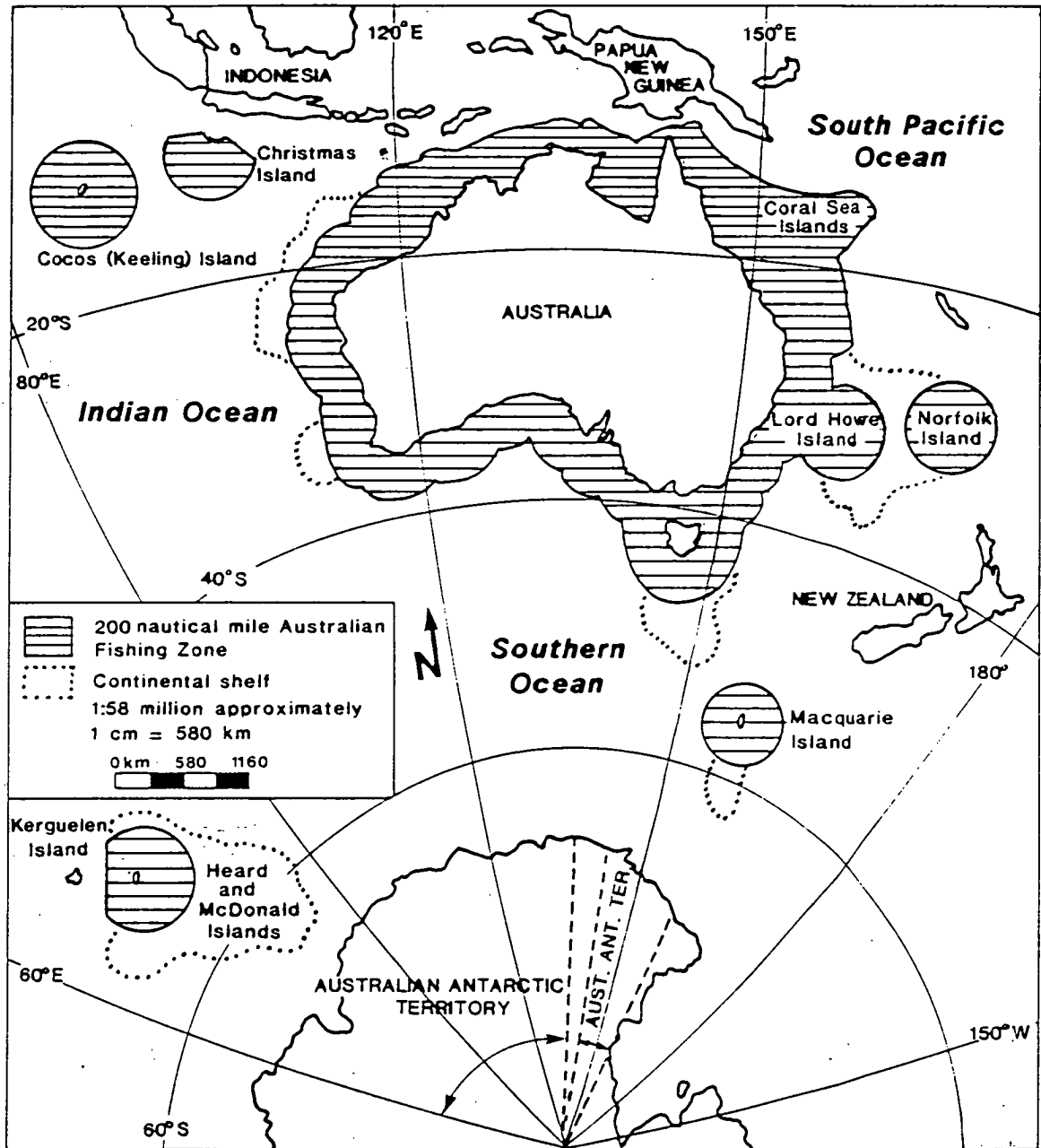
### Abstract

The offshore has been the centre of intergovernmental interaction in Australia for over twenty-five years yet has remained a neglected topic in studies of Australian federalism. This study examines the development and implementation of a complex intergovernmental arrangement, the Offshore Constitutional Settlement (OCS), which returned jurisdiction to the States from low water mark to three nautical miles offshore following the High Court's decision in the *Seas and Submerged Lands* case of December 1975, which upheld Commonwealth jurisdiction from low water mark. The OCS was established, after lengthy intergovernmental interaction, in 1979 with what were termed "agreed arrangements" implemented between 1983 and 1990.

The most visible element of offshore resource policy in the period following the Second World War is the continual expansion of the Commonwealth's interests. To focus solely on this expansion gives a limited explanation for the development of intergovernmental agreements such as the OCS which reflect the complexities of interaction between the Commonwealth and the States. A central concern of this study is to examine the factors contributing to the development of the OCS, particularly the extent to which State governments were dominant actors in the negotiations and in the implementation of the "agreed arrangements".

The study utilises an analytical framework which allows the examination of institutions and processes by which the States have been able to limit, or counter, the effective reach of increased Commonwealth constitutional power and influence and which act as parameters for intergovernmental interaction in this policy area. In structuring relations between the Commonwealth and States offshore these parameters not only emphasise the significance of a States' constitutional and political bases, but also identify elements of intergovernmental interaction which counter the more visible expansion of Commonwealth activity. The OCS is thus an outcome of the evolution (or "ebb and flow") of Australian federalism offshore in which the States remain important actors; an evolution shaped by the impact of the constitutional division of powers, judicial review of jurisdictional disputes, and Australia's responsibilities in relation to the emergent international law of the sea.

## Australian Offshore Responsibilities



Kriwoken, L.K.K., and Haward, M., "Marine and Estuarine Protected Areas in Tasmania, Australia: The Complexities of Policy Development", *Ocean and Shoreline Management* (1991): 143-163.



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Finally, to Anne, who willingly let "the thesis" take precedence over other things, my thanks and love.

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## Introduction

Australia, like the United States of America and Canada, has experienced considerable political turmoil arising from the question of jurisdiction over the offshore. In each of these federations conflicts have arisen from limited, concurrent or unclear constitutional provisions governing offshore resources. This has given rise to contending claims between the national and sub-national governments regarding sovereignty and jurisdiction offshore; claims given sharper focus by the evolving law of the sea:

In the case of a coastal state with a unitary system of government, the issue has been largely one of adapting municipal law to international law concepts. . . . Special problems, however occur when a coastal state is in a federation. A question then arises as to which entity in the federation should enjoy control or sovereignty or even ownership of the territorial sea and the continental shelf.<sup>1</sup>

Australia, Canada and the United States of America have resolved this question differently although each has borrowed and adapted the legal, political and administrative solutions produced in the other federations.<sup>2</sup>

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<sup>1</sup> R. Cullen, *Australian Federalism Offshore* (2nd revised edition) (Melbourne: Intergovernmental Relations in Victoria Programme, Law School University of Melbourne, 1988): 2.

<sup>2</sup> For example the US and Canadian court decisions were used in the Australian *Seas*

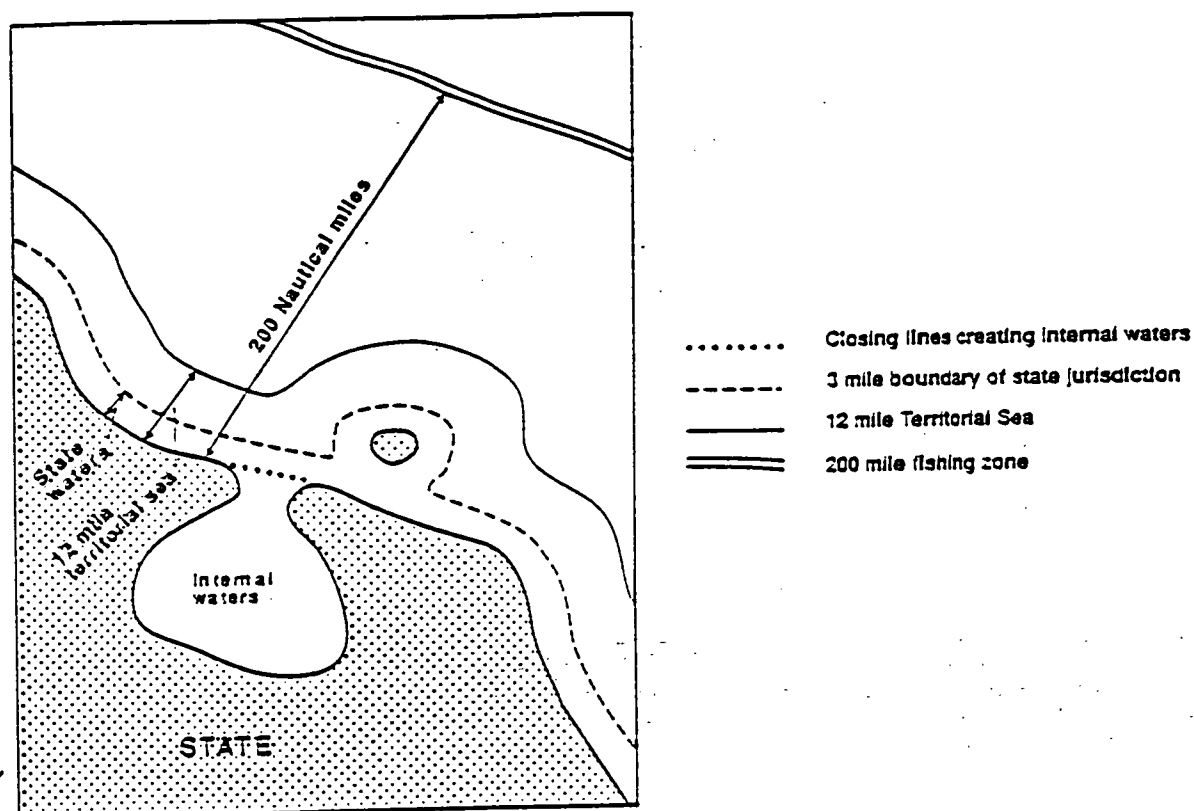
The offshore has been the centre of intergovernmental interaction in Australia for over twenty-five years yet has remained a relatively neglected topic for scholars of Australian federalism. Most analysis has been made by constitutional lawyers, with limited treatment by political scientists. Not surprisingly, therefore, few political scientists have given any attention to the Australian Offshore Constitutional Settlement (OCS).<sup>3</sup> The OCS, a curiously titled intergovernmental

*and Submerged Lands* case, the intergovernmental arrangements for offshore oil and gas established by the Australian Offshore Constitutional Settlement were influential in the structure of the Canada-Nova Scotia Accord, see R. Cullen, *Federalism in Action: the Australian and Canadian Offshore Disputes*, (Sydney: Federation Press, 1990).

<sup>3</sup> The struggle over offshore jurisdiction is briefly chronicled in most analyses of the Gorton, Whitlam and Fraser governments; see A. Patience and B. Head, (eds.) *From Whitlam to Fraser: Reform and Reaction in Australian Politics*, (Melbourne: Oxford, 1979). Specific examination of Australian federalism offshore, including the Offshore Constitutional Settlement (OCS), from a legal perspective includes B. Opeskin and D. Rothwell, "Australia's Territorial Sea: International and Federal Implications of its Extension to 12 Miles" *Ocean Development and International Law*, 22 (1991): 395-431; R. Cullen, *Federalism in Action: the Australian and Canadian Offshore Disputes*, (Sydney: Federation Press, 1990); R. Cullen, *Australian Federalism Offshore* (2nd revised edition) (Melbourne: Intergovernmental Relations in Victoria Programme, Law School, University of Melbourne, 1988); R. Cullen, "Bass Strait Revenue Raising: A Case of One Government Too Many?" *Journal of Energy and Natural Resources Law*, 6, 4 (1988): 213-247; M. Crommelin, *Offshore Mining and Petroleum: Constitutional Issues*, Papers on Federalism 3 (Melbourne: Intergovernmental Relations in Victoria Programme, Law School University of Melbourne, 1983); and J. Waugh, *Australian Fisheries Law* (Melbourne: Intergovernmental Relations in Victoria Programme, Law School University of Melbourne, 1988). The OCS is also discussed as part of the "current notes" in the *Australian Law Journal* 53, (1979) and 54, (1980). Analysis of the OCS from a political science perspective includes R.A. Herr and B.W. Davis, "The Impact of UNCLOS III on Australian Federalism" *International Journal*, XLI, 3 (1986): 674-693; M. Haward, "Marine Resource Policy In Australia; The Policy Environment, The Policy Process and the Issue Community" *Maritime Studies*, 26 (June 1986): 12-16; M. Haward, "The Australian Offshore Constitutional Settlement" *Marine Policy* 13, 4 (October 1989): 334-348 and M. Haward, "The Offshore" in B. Galligan, O. Hughes and C. Walsh (eds.) *Intergovernmental Relations and Public Policy*, (Sydney: Allen and Unwin, 1991): 116-132.

arrangement was established after lengthy intergovernmental interaction in 1979, and gradually implemented between 1983 and 1990. The OCS returned jurisdiction over the area from low water mark to three miles within the territorial sea<sup>4</sup> (See Figure 1) to the States after the High Court had upheld Commonwealth jurisdiction from low water mark in the *Seas and Submerged Lands* case<sup>5</sup> of December 1975.

Figure 1 Maritime Boundaries and Baselines



<sup>4</sup> International law and domestic politics in federations such as Australia distinguish between high seas, territorial, and internal (incorporating inland) waters. Territorial waters are those which lie offshore from a baseline, usually (but not always) the low water mark, to a boundary which under the Third United Nations Law of the Sea Conference (UNCLOS III) can be twelve miles offshore. Australia declared a twelve mile territorial sea in November 1990. Internal waters are those waters which fall on the "onshore" side of the baseline measuring the territorial sea, for example large bays and inlets. Inland waters are defined not in terms of their relation to the territorial sea but to the land. This nexus can be in terms of history as well as geography, as "historic bays" such as Spencer Gulf and the Gulf of St. Vincent in South Australia have been defined by the High Court as inland waters. See R. Cullen, *Australian Federalism Offshore*: 7-12 and B. Opekin and D. Rothwell, "Australia's Territorial Sea: International and Federal Implications of its Extension to 12 Miles".

<sup>5</sup> *New South Wales v. The Commonwealth* (1975), 135, C.L.R. 337. This is also known as the *Seas and Submerged Lands*, or the *Offshore*, case.

Emerging after extensive intergovernmental interaction between 1976 and 1979 the OCS was seen as a "milestone in co-operative federalism".<sup>6</sup> As part of the Fraser government's New Federalism initiative, the OCS was based on co-operative arrangements between the Commonwealth and State governments<sup>7</sup> over the administration and management of offshore resources. The announcement of the OCS agreement in 1979 was indeed a milestone but much further negotiation was needed to complete the agreement. Almost three years were to elapse between the introduction of the Commonwealth's complementary legislation into parliament and the proclamation of the second and crucial element of this package, the *Coastal Waters (State Titles) Act 1980*, which entrenched the OCS. The "agreed arrangements" of the OCS were implemented progressively after this legislation was proclaimed, the pace of implementation influenced by the election of the Australian Labor Party to power in March 1983. Debate over applying the OCS framework in different policy areas continued throughout the 1980s and into the 1990s.

Although questions of offshore sovereignty and jurisdiction retained a prime place on the domestic political agenda in Australia in the 1960s and 1970s, these questions had emerged as a major issue for nation

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<sup>6</sup> Commonwealth of Australia Attorney General's Department *Offshore Australia*, (Canberra: AGPS, 1980): 1.

<sup>7</sup> This study uses the convention of referring to the Australian government as the Commonwealth, rather than as national or federal, government. See G. Sawer, "Australian Constitutional Law in Relation to International Relations and International Law" in K. Ryan, (ed.) *International Law in Australia*, (2nd ed.) (Sydney: The Australian Institute of International Affairs & The Law Book Company, 1984): 36. The thesis adopts the practice of using "States" when referring to the sub-national governments of Australia to avoid confusion with references to "coastal states" in relation to the international law of the sea, except when original sources used the lower case.



states from the middle of this century. This arose from the related pressures of increased interest in exploitation of the resources of offshore waters and the emergence of coastal states' claims over the adjacent continental shelf. The discovery of substantial oil and gas resources in sedimentary basins offshore and the development of "distant water fisheries"<sup>8</sup> quickly outstripped the frameworks established by customary international law, and raised questions over the extent to which a coastal state could, under this customary law, claim and enforce jurisdiction over offshore resources.

### **Sovereignty, Jurisdiction and Coastal States: The Emergence of The Law of The Sea**

What has become known as the "law of the sea" emerged from a debate beginning in the seventeenth century between Hugo Grotius and John Selden.<sup>9</sup> Grotius argued that the sea was *mare librium* and therefore unable to be subject to claims of sovereignty by any state while Selden argued that the sea was *mare clausum* with a state able to exercise dominion over it. A modification of the Grotian doctrine saw the emergence of a consensus over the freedom of the "high seas" while enabling coastal states to claim sovereignty over adjacent coastal waters that could be defended from shore-based fortifications. The limit of sovereignty evolved into the "three mile limit" from the effective range of such defences. This distance (at the time a standard nautical measure of one "marine league") enabled coastal states to regulate shipping, customs and immigration within what was considered that state's territorial sea.

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<sup>8</sup> Distant water fisheries are those which take place a considerable distance from the home port of the vessels usually on the high sea or within the jurisdiction of foreign states.

<sup>9</sup> For a concise description of the work of Grotius and Selden see R. Cullen, *Australian Federalism Offshore* 2nd ed: 6-7.

Increasing pressure arising from the domestic political interests of metropolitan powers and the significance of maritime power in the late nineteenth and early twentieth centuries led to attempts to codify a "law of the sea" under the auspices of the League of Nations at The Hague in the 1930s. Overtaken by events leading to the Second World War, the conference at The Hague collapsed before it could achieve agreement among parties but served to focus attention on the salience of these issues in the immediate post-war period. The law of the sea was to emerge as a major issue of international concern when President Truman, on behalf of the United States of America, claimed national jurisdiction over the resources of its adjacent continental shelf in 1945. This proclamation, followed in subsequent years by similar moves by other coastal states (including Australia in 1953) led to the first international conference on the law of the sea sponsored by the United Nations (UNCLOS I) being convened in 1958. This conference resulted in four conventions being prepared, all of which entered force by the mid 1960s.<sup>10</sup>

UNCLOS I was followed by two subsequent conferences - a second, inconclusive, conference (UNCLOS II) in 1960 and a third (UNCLOS III), held between 1974 and 1982,<sup>11</sup> which resulted in a comprehensive

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<sup>10</sup> The four conventions were; Convention on the High Seas (which entered force 30 September 1962); Convention on the Continental Shelf (10 June 1964) Convention on the Territorial Sea and Contiguous Zone (10 Sept 1964) and the Convention on Fishing and Conservation of the Living Resources of the High Seas (20 March 1966). See R.D. Lumb, *The Law of the Sea and Australian Offshore Areas* 2nd ed (St. Lucia: University of Queensland Press, 1978).

<sup>11</sup> A voluminous literature exists on UNCLOS III. The first session of the conference began in Caracas Venezuela in 1974 and subsequent sessions were held in Geneva and New York. A useful introduction to UNCLOS III, its development and implications is

treaty being prepared. Australia played a significant role in the negotiations over the emergent international law of the sea, particularly at UNCLOS III,<sup>12</sup> with these developments providing a backdrop for concurrent issues of domestic politics and Commonwealth - State relations between the early 1950s and late 1980s.

### **Federalism and Offshore Jurisdiction**

In a federation, new or emergent policy areas such as the offshore<sup>13</sup> establish conflicting jurisdictional claims between the central and sub-national governments. Such claims can be ignored, leaving an uneasy *status-quo*, but more commonly the contending claims are subjected to judicial review by superior courts charged with adjudicating such disputes. A third avenue, and one which forms the basis of this study, involves the development of agreements between central and sub-national governments establishing their respective roles and responsibilities. It is widely accepted, however, that neither judicial nor intergovernmental processes are mutually exclusive. The judicial adjudication of the offshore dispute in Australia, for example, arose from a calculated political strategy which saw declaratory legislation introduced to force the States to challenge its validity.<sup>14</sup> Little analysis

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found in M. H. Norquist, (ed.) *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 1, (Dordrecht: Martinus Nijhoff, 1985).

<sup>12</sup> For a good analysis of Australia's role see K. Ryan, (ed.) *International Law in Australia*, (2nd ed.) (Sydney: The Australian Institute of International Affairs & The Law Book Company, 1984).

<sup>13</sup> In simple terms these areas include those not specially mentioned in the Australian constitution. Conflicts over jurisdiction may be resolved by judicial adjudication by the High Court; extending existing constitutional provisions, for radio and television broadcasting was interpreted to fall under the provisions of "postal telegraphic, telephonic and other like services"; or by establishing Commonwealth-State agreements to co-operate in the administration of the particular area.

<sup>14</sup> The relationship between the process of judicial review and the political outcome of such a process is heightened in contentious cases such as the *Tasmanian Dam* case

has focused on the nexus between judicial review and federal processes such as the negotiation of intergovernmental agreements<sup>15</sup> although, as Galligan, Hughes and Walsh note, "[r]egardless of how judges decide hard constitutional cases, the decisions still have to feed back into the political system where their impact may be adjusted by political negotiation."<sup>16</sup>

Formal disputes over jurisdiction are resolved in Australia (as in the United States and Canada) by an independent and entrenched superior court responsible for an "authoritative interpretation of the constitution and adjudication of jurisdictional disputes".<sup>17</sup> Less study has been made of alternative methods of mediating or moderating conflicts,<sup>18</sup> or the effect of these alternatives on the federal system. It is

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(*Commonwealth v. Tasmania* (1983), 57, A.L.J.R. 450). The High Court's adherence to a doctrine of legalism which "holds that judges interpret the constitution by reading the natural sense or plain meaning of its provisions" has, according to Galligan, allowed the High Court to establish a particular legitimacy for judicial review. B. Galligan, *Politics of the High Court*, (St. Lucia: University of Queensland Press, 1987): 31. Legalism excludes, by definition, any consideration of the potential impacts of judicial decisions. See also H. Gibbs, "Law and Government", *Quadrant*, XXXIV, 10 (October 1990): 25-29.

<sup>15</sup> See however G. Sawer, *Australian Federalism in the Courts*, (Melbourne: Melbourne University Press, 1967), 6; P. H. Russell, "The Supreme Court and Federal Provincial Relations: The Political Use of Legal Resources", *Canadian Public Policy*, X1, 2, (1985): 165-168; and A.R. Lucas, "Harmonization of Federal Provincial Environmental Policies: The Changing Legal and Policy Framework" in J. O. Saunders, (ed.) *Managing Natural Resources in a Federal State*, (Toronto, Carswell, 1985): 34 -35.

<sup>16</sup> B. Galligan, O. Hughes and C. Walsh, "Introduction" in B. Galligan, O. Hughes and C. Walsh, (eds.) *Intergovernmental Relations and Public Policy*, (Sydney: Allen and Unwin, 1991): 16.

<sup>17</sup> B. Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia*: 42.

<sup>18</sup> Chapman, for example sees intergovernmental forums as moderating intergovernmental conflicts. See R. J. K. Chapman, "Intergovernmental Forums and The Policy Process" in B. Galligan, (ed.) *Comparative State Policies*, (Melbourne: Longman Cheshire, 1988): 104; Wettenhall describes such forums as "lubricating the federal

likely that the perception of a "zero-sum" outcome of judicial adjudication, even if (as shown in the *Seas and Submerged Lands* case) such decisions rarely end intergovernmental interaction, will encourage the development of alternative arrangements. Although the High Court of Australia has been used by the Commonwealth and the States to clarify jurisdiction, in many cases the issue of the writ is simply one tactical manoeuvre within a broad strategy in Commonwealth - State relations. Even members of the High Court have reflected on complexities of such strategies; Sir Harry Gibbs, on being sworn in as Chief Justice in 1981, commented that "no legal proceedings are more futile and unproductive than disputes as to jurisdiction".<sup>19</sup> The analysis of interaction between the Commonwealth and the States *after* the question of jurisdiction has been resolved by the High Court provides a fruitful area of study of the dynamics within a federal system.

### **Australian Federalism and the Offshore**

In Australia management of marine resources and the legislative bases for such management had, until challenged by an increasingly assertive Commonwealth government in the late 1940s and early 1950s, rested with the States. Prior to federation the colonies had established their own legislation over fisheries and related activities. A vaguely worded Commonwealth power relating to fisheries was included in the constitution, although in the half-century following federation the Commonwealth had limited direct involvement in offshore matters.

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system", see R. Wettenhall "Intergovernmental Agencies: Lubricating a Federal System" *Current Affairs Bulletin* (April 1985): 28-35.

<sup>19</sup> Sir H. Gibbs "Address on Swearing in as Chief Justice of the High Court of Australia 12 February 1981" in J. McMillan, G. Evans, and H. Storey, *Australia's Constitution: Time For Change?*, (Sydney: Allen and Unwin, 1983): 287.

The Commonwealth became more active in the 1950s and 1960s with the establishment of a Commonwealth fisheries agency and the enactment of the *Australian Fisheries Act 1952* (Cwth). These developments provided the basis for increasing conflict with the States over fisheries management as the Commonwealth gradually expanded its involvement in the licensing and regulation of fisheries. Exploration for oil and gas offshore, beginning in the early 1960s, encouraged the Commonwealth to assert a direct role in offshore resources management.

The question of jurisdiction for these activities emerged more forcefully in the 1960s and 1970s following increased oil and gas exploration offshore. The Commonwealth and States made a deliberate attempt to set aside conflicts over jurisdiction which may have constrained these developments. An innovative intergovernmental agreement and legislative scheme, known as the 1967 Petroleum Agreement, established an administrative regime for offshore petroleum. This agreement accommodated State interests and created a revenue sharing arrangement between the Commonwealth and the States for royalties derived from offshore oil and gas production. This accommodation did not, however, last long.<sup>20</sup>

In 1970 Prime Minister Gorton initiated an abortive attempt to assert Commonwealth jurisdiction over offshore resources. Although this legislation was not to complete its passage through parliament it acted as a spur for legislation introduced in 1973 by the Whitlam-led Australian Labor Party (ALP) government. A declaration of

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<sup>20</sup> Although the period 1970-1975 was characterised by conflict over jurisdiction offshore, the administrative regime established in 1967 remained in place and was in effect updated under the OCS.

Commonwealth paramountcy in relation to offshore resources made through the *Seas and Submerged Lands Act 1973* (Cwth) was opposed by all State governments but upheld by the High Court.

In resolving the legal question of jurisdiction the court decision posed political problems for the Commonwealth in its dealings with the States<sup>21</sup> given their strident opposition to the original legislation. The political fallout from the *Seas and Submerged Lands* case was more sharply defined as the High Court's decision was released after the Whitlam government had been defeated in the December 1975 federal election. While the High Court had resolved the issue of jurisdiction this solution was politically unpalatable for the States, and problematic for the newly elected coalition, led by Malcolm Fraser who had campaigned on a platform of a more "co-operative" New Federalism.<sup>22</sup> The offshore "problem" would be resolved by including what were termed the "seas and submerged lands matters" within the ambit of the New Federalism. This study will emphasise that, unlike other elements of the New Federalism package, the States were primary actors in promoting what later became the OCS.

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<sup>21</sup> Except where specifically indicated, this study of Australian federalism offshore includes the Northern Territory as a State. The Northern Territory was specifically included in the OCS, although formally Northern Territory self government is based on Commonwealth legislation and lacks the constitutional independence of the other States. Granting of self government to the ACT in May 1989 have meant amendments to Commonwealth legislation governing the Jervis Bay Territory so that ACT law applies in Jervis Bay. Other Australian territories, such as the Coral Sea Islands, Norfolk, Christmas and Cocos Islands and the sub-antarctic Heard and MacDonald Islands, are subject to Commonwealth law.

<sup>22</sup> C. Saunders and K. Wiltshire, "Fraser's New Federalism 1975-1980: An Evaluation" *Australian Journal of Politics and History*, 26, 3 (1981): 355-371.

### Intergovernmental Interaction and the OCS

That the "settlement" of the long-running dispute over jurisdiction offshore hinged on an accommodation between the Commonwealth and the States is not unusual given the range of established co-operative mechanisms or the development of intergovernmental arrangements in Australia covering areas as diverse as agriculture or road funding.<sup>23</sup> Particular interest arises, however, over intergovernmental interaction in this area as it sidestepped the result of judicial review in a dispute over jurisdiction. The outcome, in Russell's terms, "illustrates both what politicians can and cannot do with a court decision favouring their level of government".<sup>24</sup>

In expanding the explanation of why and how the offshore outcome emerged, analysis needs to focus on the key features of the federal system which facilitated such an accommodation between Commonwealth and State interests. It follows then that concentrating on the increasing influence of the Commonwealth to explain the emergence of the OCS is limited, even if (to use Lucas' term) this is "the most visible gloss" of Commonwealth - State relations.<sup>25</sup> Ignoring the influence of the States, or defining away the federal division of powers and responsibilities, removes the need to analyse the institutional arrangements and processes by which the States interact with the Commonwealth.<sup>26</sup>

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<sup>23</sup> For a description of such intergovernmental arrangements see C. Wells, (Saunders) *Cooperative Federalism In Australia*, Unpublished PhD Thesis, (University of Melbourne, 1975).

<sup>24</sup> P.H. Russell, "The Supreme Court and Federal-Provincial Relations, 166.

<sup>25</sup> A.R. Lucas, "Harmonization of Federal Provincial Environmental Policies: The Changing Legal and Policy Framework", 34 -35.

<sup>26</sup> B. Galligan, O. Hughes and C. Walsh, "Introduction".



### Premises and Proposition

A central argument of this study is that the Commonwealth's legislative and administrative activity concerning the offshore did not lead to a decline in State administrative or political responsibilities. The constitutional, administrative and political parameters of federalism provide resources for the States which in effect limit the extent to which the Commonwealth can assert claims for jurisdiction. This study tests a proposition that the OCS emerged as a result of the States' articulation of these responsibilities and interests to limit the reach of reinforcements to the Commonwealth's constitutional head of power. Although a relevant counterfactual may be the case where the Commonwealth acts unilaterally, it is also arguable that even so Commonwealth priorities are subject to, or moderated by, a range of intergovernmental institutions and processes.

### Significance and Some Caveats

As indicated earlier the offshore has been a neglected topic in studies of Australian federalism. Although jurisdiction over marine resources emerged as a major focus for Commonwealth-State relations following the *Seas and Submerged Lands* case, the nexus between marine affairs and Australian federalism has a long, if neglected, history.<sup>27</sup> More significantly while the offshore can be considered *the* intergovernmental issue in the 1970s, offshore resource management still retains a major place on the contemporary agendas of various intergovernmental forums. Any examination of the OCS must therefore place it in the context of what can be described as the "evolution" of Australian federalism offshore.<sup>28</sup>

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<sup>27</sup> Issues arising from desires from the colonies to extend control over fisheries can be credited as being an influence on the establishment of (and the only real action taken by) the Federal Council of Australasia in the 1880s.

<sup>28</sup> This argument was first introduced in M. Haward, "The Australian Offshore Constitutional Settlement" and M. Haward, "Marine Resource Policy in Australia".

The contemporary nature of the OCS and the ongoing Commonwealth - State negotiations over such matters as oil and gas royalties provide particular problems for research, not the least gaining access to documentary material. As Richard Simeon noted in his classic study of intergovernmental "diplomacy" in Canada;

[r]esearch on live political issues ... has many pitfalls. Much documentation remains hidden to the researcher until long after the event.<sup>29</sup>

Documents held by Australian [Commonwealth] Archives relating to negotiations over the OCS, where available, are generally restricted with the "thirty-year" rule in force. The Australian Archives none the less provide an invaluable source of material on the broadening of the Commonwealth interest in the period following the Second World War. A federation has, however, multiple access points for archival material. The research for this study was enhanced by the granting of unrestricted access to the extensive files on the OCS and other material on what were termed "Seas and Submerged Lands Matters" collected by the Law Department of Tasmania and held by the Archives Office of Tasmania (AOT). These files provided a wealth of material on the disputes with the Gorton and Whitlam governments - in which Tasmania took a lead role - and on the negotiations in the period 1975 - 79 which led to the OCS. This material on the development of the legal and administrative arrangements comprising the OCS has not previously been made available.<sup>30</sup>

<sup>29</sup> R. Simeon, *Federal - Provincial Diplomacy: The Making of Recent Policy in Canada*, (Toronto, University of Toronto Press, 1972): 19.

<sup>30</sup> I acknowledge the assistance of the Tasmanian Crown Solicitor, Mr W. Bale and Senior Counsel Mr. M. Stoddart in gaining access to this material. In addition I was granted unrestricted access to files Mr D. A. Lowe; a Minister, Deputy Premier and Premier of Tasmania during the 1970s.

### Outline of the Study

In establishing an analytical framework from which to evaluate the premises and proposition offered above, Chapter One outlines a series of parameters by which the States have been able to limit, or counter, the effective reach of increased Commonwealth constitutional power and political influence. These parameters emphasise the significance of the States' constitutional and political bases, but also identify elements of intergovernmental interaction which counter the more visible expansion of Commonwealth activity.

Charting "the ebb and flow of seashore federalism"<sup>31</sup> in Australia forms the basis for Chapters Two, Three, Four and Five. Chapters Two and Three examine what may be broadly described as the development of offshore resources management and the consolidation of State and Commonwealth interests. The articulation of these interests was shaped by domestic political imperatives and the emergent international "law of the sea". As the conflict over jurisdiction offshore heightened in the 1970s, Commonwealth - State relations also became more sharply focused. Chapter Four examines the intense intergovernmental negotiations in the period leading to the introduction of the OCS "agreed arrangements" in 1979. Chapter Five examines the implementation of these arrangements between 1980 and 1990, and the introduction of new areas (such as offshore tourism) under the rubric of the OCS.

Chapter One provides a framework by which the argument that the OCS illustrates that the expansion of Commonwealth power offshore has not been at the expense of State offshore policy interests can be

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<sup>31</sup> This apt phrase is from P. Weller, *Malcolm Fraser PM* (Ringwood Melbourne: Penguin, 1989): 293.

assessed. Chapter Six examines the development of the OCS (described in Chapters Two, Three, Four and Five) in terms of the parameters for intergovernmental interaction identified in Chapter One. While some elements of the interaction between the Commonwealth and States may be more visible than others, the interrelationship between constitutional, political and administrative elements of Australian federalism was crucial in reinforcing State interests over the offshore and thus influential in the development of the OCS. The conclusion evaluates the proposition regarding State interests and responsibilities and considers the implications of this study for further research on federalism and Australian offshore or marine policy.

### **Federalism and the Offshore Constitutional Settlement**

The study of the OCS shows that the accommodation over the offshore has developed more as a result of the political power and the resources available to the States than the Commonwealth's "success" in judicial review of conflicts over jurisdiction. It is therefore too simplistic to focus solely on the growth of Commonwealth involvement in offshore policy in the period from the Second World War,<sup>32</sup> even though superficially it has been characterised by a pattern of increasing Commonwealth involvement since the Second World War. The Commonwealth introduced legislation and expanded its administrative responsibilities to include fisheries in the 1950s, oil and gas in the 1960s, and marine parks, marine conservation and heritage in the 1970s.

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<sup>32</sup> See M Howard "The Offshore" in B. Galligan, O. Hughes and C. Walsh (eds.) *Intergovernmental Relations and Public Policy*, (Sydney: Allen and Unwin, 1991): 116-132.

More recently, legislation before the Commonwealth parliament in early 1990 aimed to extend the Commonwealth's influence over marine environment and coastal zone protection by proposing an amendment to the Commonwealth's *Coastal Waters (State Powers)* legislation.<sup>33</sup> In spite of these Commonwealth initiatives, the OCS has entrenched both the Commonwealth and the States' interests reflecting the importance of federalism in this policy area.

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<sup>33</sup> See *Environmental Protection of Coastal Waters (State and Northern Territory Powers) Amendment Bill 1990*. This Bill was introduced into the Senate by the then Independent Senator Irina Dunn, but lapsed with Dunn's retirement following the 1990 election.

## Chapter One

### Australian Federalism and the Offshore:

#### Establishing an Analytic Framework

The Australian federal system and the study of Australian federalism have been reinforced and revitalised by the extensive interaction between the Commonwealth and the States over the last three decades. This interaction occurred as a result of the Commonwealth's increasing involvement in policy areas traditionally seen as the responsibility of the States. The increase of "central power in the Australian Commonwealth"<sup>1</sup> was seen by some commentators as evidence for the inevitable declining role and irrelevance of the States. This study shows, however, that an increase in the influence of the Commonwealth's legislative and administrative activity (during a period of generally expansive High Court judgements broadening the reach of its constitutional powers) has not led to a decline in the States' administrative responsibilities or their political interests

The States' defence of their interests has utilised a complex arrangement of intergovernmental institutions and processes which ensured that the States remained important and, given their

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<sup>1</sup> The title of a book by Sir Robert Menzies, comprised of lectures on aspects of Australian federalism delivered at the University of Virginia after his retirement as Prime Minister, *Central Power in the Australian Commonwealth*, (Charlottesville: University of Virginia, 1967).

administrative expertise, at times pre-eminent entities in the federal system. The assertions of Commonwealth power challenging State jurisdiction offshore in the early 1970s - a period considered to have placed the Australian "federation under strain"<sup>2</sup> - therefore can also be seen, almost paradoxically, to have led to increased State power and influence.<sup>3</sup>

Given that the Commonwealth's interests in a range of policy areas could not be claimed, as in Canada, on the basis of clearly defined and exclusive constitutional heads of power, the States have a range of constitutional and legal bases from which to respond. In turn the Commonwealth, lacking the detailed and extensive bureaucratic expertise which has remained a major resource for each of the States, is forced to acknowledge the utility of intergovernmental collaboration over public policy. Such collaboration provides a solution to problems arising from overlapping claims over "policy jurisdiction",<sup>4</sup> and makes joint action a logical response in a number of policy areas.

The Introduction to this thesis has suggested that the development and implementation of the Australian Offshore Constitutional Settlement (OCS) illustrates the interplay between constitutional, political and administrative elements of Australian federalism on the establishment of intergovernmental arrangements and agreements. While this

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<sup>2</sup> G. Sawyer, *Federation Under Strain: Australia 1972-75*, (Melbourne: Melbourne University Press, 1977).

<sup>3</sup> C. Sharman, "Fraser, the States and Federalism", *The Australian Quarterly*, 52, (Autumn 1980): 9-19. See also B. Galligan, "Writing on Australian Federalism: The Current State of the Art" *Australian Journal of Public Administration* XLIII, 2, (June 1984): 177-186.

<sup>4</sup> This term is used by G.S. Mahler, *New Dimensions in Canadian Federalism: Canada in Comparative Perspective*, (London: Associated University Presses, 1987).

dynamic is perhaps most clearly evident in the study of Australian federalism offshore - particularly in relation to the OCS - the intergovernmental dimension in almost all areas of Australian public policy clearly shows the utility of broader application of this analysis. This chapter is concerned with establishing a framework from which an assessment can be made of the influence of federalism on the development of arrangements governing policy towards, and the management of, offshore resources.

Federalism is a key factor in Australian governance<sup>5</sup> yet, with some significant exceptions, much of the Australian literature has ignored or understated its significance for, or as an explanation of, Australian politics and public policy.<sup>6</sup> The traditional emphasis on "the hierarchical structure of Australian government . . . at the expense of federal processes and from a federal perspective" has left, according to Fletcher, "a rich political landscape of government organisation virtually untouched".<sup>7</sup> In addition scholarly interest has tended, at least until the last decade, to concentrate on what were perceived to be the negative effects of federalism<sup>8</sup>. In general terms the Australian literature has retained a dichotomy between a view of federalism as obsolescent, inefficient or supporting inherently conservative political

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<sup>5</sup> See also R. J. K. Chapman, "Public Policy, Federalism, Intergovernmental Relations: The Federal Factor" *Publius* 20, 4, (1990): 69-84.

<sup>6</sup> See for example B. Galligan, "Writing on Australian Federalism: The Current State of the Art" *Australian Journal of Public Administration*, XLIII, 2, (June 1984): 177-186; R.J. K. Chapman, "Federalism is Alive and Surprisingly Healthy" *Australian Journal of Public Administration*, 49, 1 (March 1990): 83-86; and M. Painter "Review Article - Studying Federalism: Perspectives and Prospects" *Australian Journal of Public Administration*, 50, 2, (June 1991): 219-221.

<sup>7</sup> C Fletcher, "Rediscovering Australian Federalism by Resurrecting Old Ideas" *Australian Journal of Political Science*, 26, 1, (March 1991): 79.

<sup>8</sup> B. Galligan, "Writing on Australian Federalism": 177.



action<sup>9</sup> and an alternative perspective concentrating on the benefits arising from the diversity and responsiveness of a federal arrangement.<sup>10</sup> It is the extensive interaction between the constituent units of government in Australia which has increased the academic interest in the influence of the patterns and processes of intergovernmental relations on public policy.

The emergence of intergovernmental relations as a departure from the more classic or formal approaches to federal theory is noted by Chapman who argues that "the need for mutuality, reciprocity, exchange and co-operation place pressure on formal institutional arrangements based on hierarchical and adversarial concepts of separated authority."<sup>11</sup> Analysis of intergovernmental interaction in areas such as the offshore must therefore incorporate a framework which acknowledges these distinctive patterns and processes. A useful summary of different normative approaches used to examine the "machinery and processes of intergovernmental relations"<sup>12</sup> is provided by Norrie, Simeon and Krasnick. They emphasise that these:

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<sup>9</sup> See, for example, G. Greenwood, *The Future of Australian Federalism*, 2nd ed. (St Lucia: University of Queensland Press, 1976); G. Maddox, *Australian Democracy in Theory and Practice*, (Melbourne: Longman Cheshire, 1985); W. Brugger and D. Jaensch *Australian Politics: Theory and Practice*, (Sydney: Allen and Unwin, 1985).

<sup>10</sup> See, for example, B. Galligan, (ed.) *Australian State Politics* (Melbourne: Longman Cheshire, 1986); B. Galligan, (ed.) *Comparative State Policies* (Melbourne: Longman Cheshire, 1988); B. Galligan, (ed) *Australian Federalism* (Melbourne: Longman Cheshire, 1989) and J. Holmes and C. Sharman. *The Australian Federal System* (Sydney: George Allen and Unwin, 1977).

<sup>11</sup> R.J.K. Chapman, "Intergovernmental Forums and the Policy Process" in B. Galligan, (ed.) *Comparative State Policies*, (Melbourne, Longman Cheshire) 1988: 199-121.

<sup>12</sup> K. Norrie, R. Simeon, & Krasnick, M. *Federalism and the Economic Union in Canada*, Vol. 59, Research Studies of the Royal Commission on the Economic Union and Development Prospects for Canada, (Toronto: University of Toronto Press, 1986):121.

processes have been labelled in a variety of ways, each of which seeks to capture some of its central dimensions. "Executive Federalism" emphasises the participants: the ministers and officials. . . . "Federal-provincial diplomacy" emphasises the parallels between federal-provincial relations and international relations. "Cooperative federalism" or "collaborative federalism" stresses the sense that public policy . . . is the outcome of the joint working of . . . governments and the degree of coordination among them. "Competitive federalism" underlines what may be seen as an important shift in process, from an emphasis on substantive policy concerns (or functional federalism) to an increased concern of governmental relations with the articulation of competing visions of the very character of the federation. . . . As these varied terms suggest, the processes of intergovernmental relations are bewilderingly complex and varied.<sup>13</sup>

Rosenthal and Hoefler comment that, while a commonplace in the American literature, "[t]oo much can be made, perhaps, of the distinction between "federalism" and "intergovernmental relations" since many scholars pass easily from one term to the other".<sup>14</sup> In attempting to draw distinctions between federalism and intergovernmental relations many studies, according to Rosenthal and Hoefler, "fail to deal explicitly with matters related to differences in *units of analysis* and *levels of analysis*".<sup>15</sup> In attempting to provide a synthesis between different approaches Rosenthal and Hoefler state that:

[i]t is our contention that the core units for American *federalism* remain the national and state governments. At the same time, if students of federalism and [intergovernmental relations] are to engage in constructive dialogue, each must pay greater attention to how the structure of relations among core units produces constitutional "rules" that affect the behavior of "officials and bureaucrats".<sup>16</sup>

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<sup>13</sup> Ibid: 121-122.

<sup>14</sup> D. B. Rosenthal and J. M. Hoefler, "Competing Approaches to the Study of American Federalism and Intergovernmental Relations", *Publius* 19 (Winter 1989): 2.

<sup>15</sup> Ibid (original emphasis).

Such an observation provides an important insight particularly relevant to analysing Commonwealth - State interaction over the offshore. The structure of relations arising from the federal division of powers is as an important parameter for intergovernmental interaction in federal systems as is the more traditional emphasis on constitutional autonomy or jurisdiction.<sup>17</sup> Greater attention must be given to the relationship between "governments" as an important and defining characteristic of interaction within federal systems. The structure of relations may be broadened or narrowed in response to external factors such as the entry into force of international treaties, as constitutional adjudication reinforces the formal constitutional power of the central government. Intergovernmental interaction therefore involves a consideration of more than heads of power or claims for jurisdiction and can include the development of quasi - constitutional arrangements which institutionalise collaboration between governments and help shape the structure of these relations.<sup>18</sup>

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<sup>16</sup> Ibid (original emphasis): 3.

<sup>17</sup> The classical federal theory's concentration on constitutional autonomy has also been criticised from alternative theoretical bases, including that described as the sociological interpretation of federalism. This interpretation argued that "the essence of federalism lies not in the institutional or constitutional structure but in society itself", - see W.S. Livingston, "A Note on the Nature of Federalism", *Political Science Quarterly*, LXVII, 1, (March, 1952): 81-95, reprinted in A. Wildavsky, (ed.) *American Federalism in Perspective*, (Boston: Little, Brown, 1967): 36. The most articulate criticism of this approach has been made by Cairns, whose attack on the sociological bases of federalism is more strident given the Canadian context of his analysis. Cairns argues that

[f]rom the mid-thirties to the present we have not lacked sociological approaches to federalism. The weakness of our understanding lies elsewhere, in a failure to treat government with enough seriousness. . . . [F]ederalism at least in the Canadian case, is not a function of societies but of the constitution, and more importantly of the governments that work the constitution.

A. C. Cairns, "The Governments and Societies of Canadian Federalism", *Canadian Journal of Political Science*, X, 4, (December 1977): 698-699.

A key issue in the study of intergovernmental relations in a federal system is the identification of patterns, and the influence of the processes, of negotiation between constituent units and the relationship between this interaction and other elements influencing intergovernmental outcomes, such as the results of constitutional adjudication. Arguing that the States can effectively counter the increasing reach of the Commonwealth's power and influence in areas such as the offshore highlights the centrality of key parameters of Commonwealth - State interaction. The first of these parameters is the Australian division of powers which establishes the States as legal entities with concurrent constitutional powers and responsibilities in a range of areas. A second parameter arises from the fact that the States are political as well as legal units. The States can counter the expansion of Commonwealth constitutional power occurring through judicial review through the politics of Commonwealth-State relations. A combination of the States' legal and political bases establishes a further parameter of intergovernmental interaction: the development of intergovernmental institutions. These institutions arise from the Commonwealth's need to consult and

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<sup>18</sup> Empirical evidence of the tendency for "interdependent" or "co-operative" rather than "independent" or "co-ordinate" government action to characterise the operation of the federal system led to further criticism on the emphasis on formal autonomy of each tier of government. One of the most imaginative of these critiques is the well known analogy of the "marble cake" proposed by Grodzins. M. Grodzins, "The Federal System" originally published in *Goals for Americans*, The American Assembly, Columbia University New York, 1960 reprinted in A. Wildavsky, (ed.) *American Federalism In Perspective: Introductory Readers in American Politics*, (Boston: Little, Brown and Company, 1967) : 257. For a recent reappraisal of Grodzin's work, and its application to Australia see C. Fletcher, "Rediscovering Australian Federalism by Resurrecting Old Ideas" *Australian Journal of Political Science*, 26, 1, (March 1991): 79-84.

negotiate with the States over the development, implementation or coordination of public policy where it does not have exclusive constitutional power.

Areas such as the offshore, which had been the focus of struggles over jurisdiction, provide useful bases from which to examine the impact of these parameters shaping Commonwealth - State agreements. As intergovernmental negotiation giving rise to the OCS took place after judicial adjudication of claims to jurisdiction, Russell's argument that there are political limits to the use to judicial resources is clearly relevant.<sup>19</sup> The study also shows, however, that such judicial adjudication outlines the political limits to such negotiations.

In order to examine the process of intergovernmental interaction leading to the OCS and the extent to which this allows the States to limit the constitutional gains of the Commonwealth, the various elements influencing this interaction need to be explicated. The following sections consider each of the main parameters underpinning the process of intergovernmental interaction: the constitutional division of powers; the impact of judicial adjudication of disputes over jurisdiction; the influence of international treaties on the domestic political order; and the establishment of intergovernmental processes and institutions. These parameters can be seen as resources to be used and/or countered in the more-or-less continuous interaction between Commonwealth and State governments in policy areas such as the offshore.

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<sup>19</sup> P.H. Russell, "The Supreme Court and Federal Provincial Relations: The Political Use of Legal Resources", *Canadian Public Policy*, XI, 2, (1985): 165.

### The Constitutional Division of Powers

The Australian constitution provides for a division of powers based on the United States model; a limited number of specific powers are enumerated for the Commonwealth, the remainder are to be exercised concurrently with the unspecified, residual, powers remaining with the States. Unlike the Canadian constitution there are no specific lists of the powers of the sub-national governments, with the result that in Australia "most commonwealth powers are concurrent and thus exercisable by either the commonwealth or the states".<sup>20</sup> The presence of parallel jurisdiction defined by this particular constitutional structure means the Commonwealth is unable to unilaterally impose policy proposals on the States. Equally, however, the division of powers may mean that the States are unable to legislate, regulate or administer areas which spill over State boundaries. The constitutional division of powers is therefore an important element in establishing and maintaining intergovernmental interaction.

The constitutional base of Commonwealth - State relations is enhanced by the simple fact that the Commonwealth cannot unilaterally change the constitution nor abolish any of the original States. Thus constitutional recognition is fundamental in entrenching this interaction. The basis of Commonwealth - State relations extends, however, well beyond the limited number of exclusive powers, the recognition of the original States or practical issues of constitutional amendment. Intergovernmental interaction is enhanced by specific provisions within the constitution. The presence of the "reference" and

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<sup>20</sup> C. Saunders, "Constitutional and Legal Aspects" in B. Galligan, O. Hughes, and C. Walsh (eds.) *Intergovernmental Relations and Public Policy* (Sydney: Allen and Unwin, 1991), 39.

"request" powers<sup>21</sup> indicates that the drafters of the Australian constitution envisaged an evolutionary process where powers could be transferred between the Commonwealth and the States as required.<sup>22</sup> The limited use of these powers (with the request power first used to anchor the OCS in 1980) may reflect political rather than constitutional imperatives, with the States reluctant to refer powers to the Commonwealth for symbolic rather than practical reasons. The constitution also includes a provision (Section 51 xxxi) which ensures compensation to the States for territory acquired by the Commonwealth, further reinforcing the recognition of States' interests in the federal system.

The ability of the States to legislate in a range of areas under their own constitutions, which pre-date federation, has led to complex administrative and regulatory instruments being established under State law.<sup>23</sup> These arrangements can reinforce State interests and sharpen the conflict with the Commonwealth over jurisdiction following the entry of the Commonwealth into areas over which the States have established, and longstanding, administrative arrangements. Claims for the Commonwealth involvement may be driven by arguments concerning the national interest with the Commonwealth linking its responsibilities under international law to domestic policy. Disputes over jurisdiction are obviously one catalyst for negotiations over intergovernmental arrangements although other imperatives may give rise to such interaction. For example the fiscal dominance of the Commonwealth may mean that the States retain

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<sup>21</sup> Section 51 xxxvii and Section 51 xxxviii respectively.

<sup>22</sup> C. Saunders "Constitutional and Legal Aspects": 43.

<sup>23</sup> Good examples, which will be discussed in subsequent chapters, include the development of State fisheries legislation and regulations.

formal jurisdiction in a particular area but remain dependent on financial transfers from the Commonwealth. Intergovernmental agreements may be encouraged from States, conscious of the aphorism "they who pay the piper call the tune", keen to counter a perceived loss in State autonomy as a result of the financial power of the Commonwealth.

It is obvious that claims (or even assumptions) of State autonomy are based upon bureaucratic or administrative support for State legislation derived from State constitutions. The States develop expertise (particularly in gathering data from which to base future decisions) which the Commonwealth, entering a new or emergent policy area, may lack. As shown in the following chapters the States had substantial claims for greater technical capability and resources in areas such as fisheries management. State expertise may provide an effective counter to the expansion of Commonwealth interests by making the Commonwealth dependent on the States for the collection of information or even, as in the case of fisheries management, the enforcement of Commonwealth laws and regulations. This, together with formal constitutional and legal recognition, enables the States to claim membership of, and participate in, various intergovernmental institutions.

The constitutional status of Commonwealth and State co-operative arrangements where State officials administer Commonwealth laws raises several important issues. Much of the commentary on Australian constitutional law has identified the vague and "enigmatic" nature of the provisions of executive power in the Australian



constitution.<sup>24</sup> Zines argues that, in spite of the problems that these provisions raise, "[f]or those who support a degree of co-operative federalism, it would be a pity if the Constitution prevented the Commonwealth using State officials and governments for its purposes or vice-versa."<sup>25</sup> Such practices have, however, given rise to concerns over the accountability of intergovernmental arrangements.

Intergovernmental arrangements harmonising Commonwealth and State responsibilities may minimise conflict between governments. In terms of conflicts between Commonwealth and State laws the Constitution includes a specific provision (Section 109) to forestall any dispute. Given the concurrent nature of much of the Commonwealth's powers this area was a potential source of tension. Commonwealth law will prevail if there is an inconsistency between Commonwealth and State legislation. The interpretation of the inconsistency provisions of Section 109 has broadened greatly in the 1980s following the High Court's decision that "inconsistency is created not only when there is direct conflict . . . but also when a commonwealth act is construed to cover an entire legislative field."<sup>26</sup> As Saunders comments:

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<sup>24</sup> M. Crommelin, *The Commonwealth Executive: A Deliberate Enigma*, Papers on Federalism 9, Intergovernmental Relations in Victoria Programme (Melbourne: Melbourne University Law School, 1986). Political scientists, perhaps understandably, have been less concerned with the constitutional implications of Commonwealth-State co-operation.

<sup>25</sup> L. Zines, *The High Court and the Constitution*, 2nd ed. (Sydney: Butterworths, 1987): 241. Zines quotes, however, the doubts expressed by Professor Richardson to the Senate Select Committee on Offshore Petroleum over the legality of arrangements where Commonwealth laws are administered solely by State officials responsible only to State governments.

<sup>26</sup> Saunders "Constitutional and Legal Aspects": 39.

some uncertainty and disruption may be expected whenever the Commonwealth moves into a legislative field hitherto occupied only by the states. This suggests the need for consultation, and if possible co-operation between the levels of government on such occasions although tactical considerations may dictate otherwise.<sup>27</sup>

The expansion in the interpretation of the reach of Section 109 reflects the more or less continual expansion of Commonwealth powers since the High Court abandoned what has been termed "the doctrine of implied immunities" in 1920. The effect of this expansion has, however, been most notable in the 1970s and 1980s through the High Court's interpretation of the external affairs power (Section 51 xxix). Where the Commonwealth's domestic policy imperatives have a nexus with developments in international law, the High Court has ruled that international obligations over-ride State government policy or practice.<sup>28</sup>

### International Law, Treaties and Australian Federalism

The interpretation of the external affairs power has provided the most obvious broadening of the reach of Commonwealth constitutional heads of power in the 1970s and 1980s. This has influenced intergovernmental interaction in two related ways. It has expanded the reach of Commonwealth powers in areas, to use Saunders' terms, which have been occupied by the States; for example the protection of the environment or control of marine pollution. The external affairs power has also given the Commonwealth a major lever

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<sup>27</sup> Ibid.

<sup>28</sup> For a useful discussion of the impact of international law on Australian federalism see H. Collins, "Federalism and Australia's External Relations", The Inaugural Arthur Calwell Memorial Lecture, *Australian Outlook*, 39, 2 (August 1985): 123-126; and H. Collins "Federalism, the States and International Affairs: A Political Science Perspective" in B. Galligan, (ed.) *Australian Federalism*, 184-191.

in its negotiations with the States. As in most cases the outcomes from the use of this leverage are as significant as the impact of the increased reach of Commonwealth's powers. Leverage can also be exerted from the opposite direction. The States have been able to negotiate significant financial compensation from the Commonwealth as a result of the political ramifications of their intervention in areas of environmental policy.

The significance of the external affairs power in Commonwealth-State relations is derived from the Commonwealth's power to legislate to overturn State legislation seen as inconsistent with its obligations under international conventions or treaties. This becomes an important resource for the Commonwealth in negotiations with the States, particularly given the High Court's current interpretation of the external affairs power. While the *Franklin Dam* case is perhaps the best known example, many areas of Commonwealth - State relations are affected by the extent of Australia's international obligations. Discussion in subsequent chapters illustrates the considerable power given to the Commonwealth in its negotiations with the States over offshore oil and gas in the mid 1960s following the entry into force of the United Nations Conventions on the Continental Shelf and the Territorial Sea and Contiguous Zone.<sup>29</sup> More recently the passage of domestic legislation to give force to or implement arrangements under treaties such as the London Dumping Convention and the Treaty of Rarotonga (the South Pacific Nuclear Free Zone Treaty) have had a significant effect on limiting offshore activities undertaken by the States.

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<sup>29</sup> To reinforce the use of the external affairs power these conventions were annexed to the *Seas and Submerged Lands Act 1973*.

The High Court's decision in the *Franklin Dam* case is often seen as an example of the use of the external affairs power by the Commonwealth to intervene in domestic policy or to restrict activities of the States, with some commentators claiming that it foreshadowed "the end of federalism".<sup>30</sup> Collins notes, however, that the outcome of the *Dams* case resulted in "extraordinary administrative negotiations" as Tasmania asserted and gained considerable financial compensation for the Commonwealth's action.<sup>31</sup> In spite of the far reaching consequences of the *Franklin Dam* case the High Court's majority decision, as could be expected, owed more to precedent than some contemporary commentators acknowledged.<sup>32</sup> The impact of international conventions on Australian federalism, and domestic policy following the *Franklin Dam* case did, however, focus greater attention on the significance of the High Court and the process of judicial review.

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<sup>30</sup> G. Samuels, "The End of Federalism" *Current Affairs Bulletin*, 56, 1, (August 1984): 11-19.

<sup>31</sup> H. Collins, "A Political Science Perspective", 186.

<sup>32</sup> G Samuels, "The End of Federalism". For a more reasoned argument see B. Galligan, *Politics of the High Court: A Study of the Judicial branch of Government in Australia*, (St Lucia, University of Queensland Press) 1987. Important precedents for the Commonwealth's action in legislating over South West Tasmania were provided by *Burgess'* case in 1936 (*R v. Burgess ex parte Henry* (1936) 55 C.L.R. 608) and the *Seas and Submerged Lands* case in 1975. The latter case also concerned the meaning the High Court placed on the term "external". Some members of the Court in the *Seas and Submerged Lands* case considered that this power had a spatial element referring to the power to make laws outside the terrestrial boundaries of the Commonwealth. Even so, as Zines states, "[i]t is true that States have some concurrent power in this area . . . if its connections with the State are such that it can be described as a law for the peace order and good government of the State". L. Zines, *The High Court and the Constitution*: 262.

## The High Court and Judicial Review

Competition and conflict over jurisdiction in policy areas such as the offshore is bound at some stage to involve adjudication by the High Court. An assessment of the role and impact of judicial review in the Australian federal system differs between the more limited "black letter" legal interpretation - judicial review solely in terms of the formal decisions of the High Court - and a more sophisticated argument which acknowledges the role of judicial review as part of broader processes of intergovernmental interaction.<sup>33</sup> To appreciate the latter approach, in essence "the political significance of a particular judgement by the Court", Collins urges the analysis of "the aftermath of the decision as carefully as the calculations which led to the case and the reasoning supporting the judgement".<sup>34</sup>

There is no dispute that High Court decisions have had great influence in the evolution of Australian federalism although it is the political outcomes of these decisions which are more interesting. Unlike its companion courts in the United States and Canada the High Court of Australia has disassociated itself from the implications of its decisions by the adoption of a formal, "legalistic" approach to constitutional adjudication.<sup>35</sup> The role of the High Court in constitutional adjudication in the past has reflected the almost axiomatic statement that the political role and significance of the Court is inversely related to

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<sup>33</sup> For a brief critical view of Australian legal scholarship in this area see B. Galligan "Introduction" *Australian Federalism*, and M. Painter "Review Article - Studying Federalism: Perspectives and Prospects" *Australian Journal of Public Administration*, 50, 2, (June 1991): 219-221.

<sup>34</sup> H. Collins, "A Political Science Perspective", 186.

<sup>35</sup> B. Galligan, *Politics of the High Court*; 38-39. The Australian High Court does not produce advisory opinions "on reference" in the manner of the Canadian Supreme Court; nor does it have to interpret a United States style Bill of Rights.

the Court's own perception of its influence in the political or public policy arenas. The recent decision in the *Mabo* case<sup>36</sup> reinforces the view that "[c]onstitutional adjudication is not simply a matter of legal interpretation ... it is also political decision making of a high profile and contentious character."<sup>37</sup>

The definition of legalism and of the limited role of the High Court was clearly expressed by Sir Owen Dixon, a former eminent Chief Justice. Dixon's address after being sworn in as Chief Justice in 1952 included this view of judicial review in Australia:

Federalism means a demarcation of powers and this casts upon the Court a responsibility of deciding whether legislation is within the boundaries of allotted powers. Unfortunately that responsibility is very widely misunderstood . . . and it is not sufficiently recognized that the Court's sole function is to interpret a constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line drawn consequently or on the other. . . . Such a function has led us all I think to believe that close adherence to legal reasoning is the only way to maintain the confidence of all parties in federal conflicts. It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.<sup>38</sup>

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<sup>36</sup> *Mabo v. Queensland*, Unreported High Court Judgement 3rd June 1992.

<sup>37</sup> *Ibid.*, 38. For a defence of the court's position see H. Gibbs, "Law and Government" *Quadrant*, XXXIV, 10 (October 1990): 25-29.

<sup>38</sup> O. Dixon, "Address Upon Taking the Oath of Office in Sydney as Chief Justice of the High Court of Australia on 21st April 1952" in *Jesting Pilate and Other Papers and Addresses*, (Melbourne: Law Book Company, 1965).

Dixon's speech has been often quoted as the definitive statement of the High Court's position on legalism, see B. Galligan, *Politics of the High Court* and S. Gageler, "Foundation of Australian Federalism and the Role of Judicial Review" *Federal Law Review*, 17, (1987): 175

The legalism which has dominated operation of the High Court is responsible, according to Galligan, for the success of judicial review within the Australian federal system.<sup>39</sup> In part this success has arisen because the High Court has avoided the political mine-fields of the advisory opinion mechanism, so influential in the offshore disputes in Canada.<sup>40</sup> Although advisory opinions had been rejected by the High Court in the early 1920s, recommendations of a Senate Select Committee to alter the Australian constitution to permit their use were accepted by the Commonwealth parliament in the early 1980s. Commonwealth officials argued that advisory opinions would reduce the conflict over disputed jurisdiction. The then Secretary of the Commonwealth Attorney-General's Department claimed that the challenge to the *Seas and Submerged Lands Act*:

could have been avoided at an earlier and no doubt more convenient stage if an Advisory Opinion on the validity of the basic provisions had been able to be obtained from the High Court. In fact the Advisory Opinion given by the Supreme Court in Canada on the Ownership of Offshore Mineral Rights ... was relied upon by the High Court.<sup>41</sup>

Legislation was prepared for this referendum (the *Constitution Alteration (Advisory Jurisdiction of High Court) Act 1983*) which passed both houses but no writ for the referendum was issued and thus the proposed referendum lapsed.<sup>42</sup>

<sup>39</sup> B. Galligan, *Politics of the High Court*, 41.

<sup>40</sup> See R. Cullen, *Federalism in Action The Australian and Canadian Offshore Disputes*, (Sydney: Federation Press 1990) and M. Haward "Intergovernmental Relations and Offshore Resources Policy In Australia and Canada" *Australian - Canadian Studies*, 9, 1&2 (1991): 35-51.

<sup>41</sup> Parliament of the Commonwealth of Australia, Senate Standing Committee on Constitutional and Legal Affairs *Advisory Opinions by the High Court*, Parliamentary Paper No 222 (1977): 39.

Canadian experience tends to counter the belief that advisory opinions would have avoided conflict over jurisdiction offshore. Advisory opinions have been used in the Canadian system to consider the question of offshore jurisdiction (the opinions presented in 1967 and 1984 by the Canadian Supreme Court concerned with offshore mineral rights) yet such actions have still resulted in major federal - provincial conflicts.<sup>43</sup> Subsequent events in Canada, particularly the political dispute underlaying the Hibernia reference which led to the negotiation of the Atlantic Accord *after* the Supreme Court decision,<sup>44</sup> as well as the intergovernmental negotiation over the Nova Scotia Accord show that in practice this view may not have been able to be sustained. Australian commentators have argued that the issue of advisory opinions has been sidestepped by the actions initiated by State Attorneys-General to declare Commonwealth legislation invalid.<sup>45</sup>

The High Court's attitude to intergovernmental agreements has obvious implications for intergovernmental relations and what the Court itself has termed "co-operative federalism". Saunders comments that "[s]omewhat unexpectedly, the High Court has developed a greater tolerance to the constitutional validity of schemes with an intergovernmental flavour".<sup>46</sup> As Sawyer has indicated:

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<sup>42</sup> See B. Galligan "The 1988 Referendums in Perspective" in B. Galligan and J.R. Nethercote, *The Constitutional Commission and the 1988 Referendums*, (Canberra: CRFFR/RAIPA - ANU, 1989): 145.

<sup>43</sup> The implications of these references are discussed in greater detail in later chapters.

<sup>44</sup> This provides a useful parallel with the OCS, and is discussed in more detail in Chapter Four.

<sup>45</sup> J. Crawford, *Australian Courts of Law*, (Melbourne: Oxford University Press, 1982): 154.

<sup>46</sup> C. Saunders "Constitutional and Legal Aspects", 44. The High court has been reluctant to unravel intergovernmental agreements with the decisions in *Re: Duncan*



High Court decisions have facilitated the development of co-operative federalism in two ways. . . . [T]he conditional grants power, section 96 has been treated as enabling the Federal Parliament to set whatever conditions it pleases for a grant - in particular, in the *Second Uniform Tax Case* the court refused to imply limitations on the power from the nature of federalism. On the other hand, the court stressed in both *Uniform Tax Cases* that section 96 does not enable the federal authorities to use legal compulsion on a State to make a grant. The court has also been reluctant to treat agreements between the federal and State governments as creating rigid legal ties; the assumption is that they create 'gentlemen's agreements', disputes about which must be settled by negotiation as in the *Rail Standardization Case* (1962).<sup>47</sup>

In *Re: Duncan* individual members of the High Court indicated that such arrangements are inevitable developments arising from co-operation between the Commonwealth and the States. Chief Justice Gibbs stated:

[i]t would be an absurd result, for example, if the Commonwealth and a State were unable, by complementary legislation to . . . give power to a fisheries inspector to act in Australian waters both within and beyond territorial limits. . . . There is nothing in the decisions of this Court to provide authority for such a restrictive view of constitutional power.<sup>48</sup>

If the Court is unlikely to unravel agreements between the Commonwealth and States this added impetus may be given to establish such arrangements. The High Court has viewed such

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(*Re Duncan: Ex Parte Aust. Iron and Steel Pty Ltd* (1983) 57 A.L.J.R. 649) and in the *Port Macdonnell* case (*Port Macdonnell Professional Fishermen's Association Inc v South Australia and the Commonwealth*, (1989) 63 A.L.J.R. 671) important precedents.

<sup>47</sup> G. Sawyer, *The Australian Constitution* (2nd ed.) (Canberra: AGPS 1988): 106.

<sup>48</sup> *Re Duncan: Ex Parte Aust. Iron and Steel Pty. Ltd.* (1983) 57 A.L.J.R. 655 (Gibbs).

agreements as essential to establish frameworks for co-operative policy-making in a federal system,<sup>49</sup> or as political arrangements rather than "enforceable contracts at law".<sup>50</sup>

While recent studies have drawn attention to the significance of the "politics of of the High Court",<sup>51</sup> concentrating on the formal outcome of judicial review tends to understate the influence of political bargaining that takes place after the Court has brought down its decision. It is the political consequences of judicial decisions that provide particular interest, and which bring intergovernmental interaction into sharp focus.<sup>52</sup> Although the process of judicial review is well entrenched in Australia the establishment of intergovernmental agreements is one means which reduces the extent of, or costs from, judicial review.

In Australia, as in Canada, the dynamics of federalism lie outside the decisions of the Courts. Norrie, Simeon and Krasnick emphasise that while individual references to the Canadian Supreme Court have "greatly affected" both private and government interests "[y]et even here decisions are seldom the end of the story, rather they reallocate the resources for yet further rounds of negotiation."<sup>53</sup> Examination of the offshore emphasises that judicial review, although influential in determining (with authority) jurisdiction, is more important in

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<sup>49</sup>*Re Duncan: Ex Parte Aust. Iron and Steel Pty Ltd* (1983) 57 A.L.J.R. 649.

<sup>50</sup> *South Australia v. Commonwealth* (1962) 108 C.L.R. 130. (The *Rail Standardization* case).

<sup>51</sup> See, for example, B. Galligan, *Politics of the High Court*.

<sup>52</sup> P.H. Russell, "The Supreme Court and Federal Provincial Relations": 162.

<sup>53</sup> K. Norrie, R. Simeon, & Krasnick, M. *Federalism and the Economic Union in Canada*: 63.

establishing boundaries for intergovernmental interaction than in resolving jurisdictional disputes. Even in areas such as the offshore, where Commonwealth jurisdiction had been upheld by judicial adjudication, any outcome will reflect Russell's contention that "the level of a government's activity in a given field of policy depends less on its constitutional resources than on its will to use the resources it has".<sup>54</sup>

The High Court has therefore an important, if somewhat secondary, function of setting limits in relation to intergovernmental interaction. Legal questions over the status of such arrangements - whether or not they are *ultra vires* - or third party challenges may involve the High Court in narrowing the limits of Commonwealth - State relations in a particular policy area.<sup>55</sup> The process of judicial review is none the less an important influence on intergovernmental interaction. In arbitrating jurisdictional disputes the Court clarifies, but does not necessarily finalise, the limits to arrangements between Commonwealth and State governments. The constitutional gains to one tier of government as a result of the outcomes of judicial review may be viewed as a legitimate aspect of intergovernmental interaction; evidence from the decisions in the *Seas and Submerged Lands*<sup>56</sup> and *Franklin Dam*<sup>57</sup> cases indicates, however, that such adjudication leads to a further, more intense, round of intergovernmental bargaining involving key intergovernmental institutions.

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<sup>54</sup> For a discussion of the role of the Canadian Supreme Court in intergovernmental struggles see P. H. Russell, "The Supreme Court and Federal-Provincial Relations: 165.

<sup>55</sup> N. Bankes, "Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia", *Alberta Law Review*, XXIX, 4 (1991): 792-838.

<sup>56</sup> *New South Wales v Commonwealth* (1975) 135 C.L.R. 337

<sup>57</sup> *Commonwealth v. Tasmania* (1983), 57 A.L.J.R. 450

### Intergovernmental Institutions, Processes and Outcomes

The emergence of intergovernmental arrangements and agreements in the wake of the Commonwealth's expanded involvement in a range of policy areas reflects the institutions and processes commonly (and at times incorrectly) labelled "co-operative federalism" but the emphasis on co-operation does not necessarily imply harmony nor consensus. Co-operation between the Commonwealth and State governments, evident in a range of areas, is an obvious feature of the Australian federal system. The observation of widespread collaboration, and the benefits arising from co-operation or joint action in managing problems such as spillovers or overlapping jurisdiction, have led to scholars, Justices of the High Court and Commonwealth and State politicians supporting the intergovernmental interaction subsumed under the broad rubric (and sometime rhetoric) of "co-operative federalism."<sup>58</sup>

Saunders concluded her detailed analysis of several intergovernmental arrangements in Australia with the view that "whatever the assessment of the efficacy or disadvantage of individual co-operative schemes, co-operative federalism in some form is necessary, and indeed inevitable, in many areas of government activity."<sup>59</sup> Co-operative federalism may in fact be a shorthand for Rosenthal and Hoefler's

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<sup>58</sup> See for example C. Wells, (Saunders) *Co-operative Federalism in Australia*; G. Sawyer, *Modern Federalism*, (London: Watts, 1969) and *Cooperative Federalism and Responsible Government in Australia*, The Fourth Alfred Deakin Lecture (Melbourne: Alfred Deakin Lecture Trust, 1970) and R. Cranston, "From Co-Operative to Coercive Federalism and Back?" *Federal Law Review*, 10 (1979): 121-142.

<sup>59</sup> C. Wells, (Saunders) *Co-operative Federalism in Australia*, Unpublished PhD Thesis Faculty of Law Melbourne University (1975): 454. Warhurst has argued that even "where constitutional authority . . . is divided . . . [policy making] can be undertaken in practice only on the basis of joint action between governments", "Managing Intergovernmental Relations" in H. Bakvis, and M. Chandler, (eds.) *Federalism and the Role of the State*, (Toronto, University of Toronto Press), 1987: 259.

"constitutional rules" emerging from the structure of relations between governments.<sup>60</sup> This is clearly an issue in the development of the the OCS which, for example, was launched as "a milestone in co-operative federalism. Although the OCS undoubtedly established a foundation for intergovernmental collaboration based upon the recognition of the interests and responsibilities of both the Commonwealth and State governments, it did not forestall ongoing intergovernmental conflict over fisheries, or prevent conflicts arising over Commonwealth policies towards offshore tourism or even coastal zone management.

In spite of being an important element in the Australian federal system, and in fact predating federation, analysis of intergovernmental arrangements and processes has only recently emerged as a feature of the Australian literature. Little analysis has been made of the basis of this collaboration or of the detailed intergovernmental bargaining and accommodation leading to these arrangements. Because of the relative difficulty of isolating these interactions,<sup>61</sup> which in any one issue may incorporate a range of responses - between "disintegrative conflict" and "joint policy making",<sup>62</sup> formal agreement is generally accepted as

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<sup>60</sup> D. B. Rosenthal and J. M. Hoefler, "Competing Approaches to the Study of American Federalism and Intergovernmental Relations", *Publius* 19 (Winter 1989): 1-23.

<sup>61</sup> A notable exception is C. Wells, (Saunders) *Co-operative Federalism in Australia*. In general the literature has focussed on the complexities of such arrangements. See K. Wiltshire, *Administrative Federalism: Select Documents in Australian Intergovernmental Relations*, (St.Lucia: University of Queensland Press, 1977), 9. Sharman has described Australian intergovernmental relations as protean, see "Grappling with Proteus - A Survey of Intergovernmental Relations, *Australian Journal of Public Administration*, 53, (1984): 278-295. The research papers produced by the Australian Council for Intergovernment Relations (ACIR) reinforce the difficulties in examining intergovernmental linkages; see ACIR *The Register of Commonwealth-State Cooperative Arrangements* 1985 ACIR Information Paper 10, (ACIR, Hobart, 1985) and *Operational Procedures of Interjurisdictional Ministerial Councils* ACIR Information Paper 13, (Hobart: Tas Gov't. Printer, 1986).

evidence of co-operation.

Co-operation may arise from the need to provide a solution to the dilemmas arising from divided jurisdiction and competing claims for responsibility in a particular policy area. The material presented in later chapters emphasises that "co-operative federalism" is not necessarily predicated on a harmonious relationship between Commonwealth and the States. As Keohane has stated, co-operation is not a synonym for harmony:

[h]armony refers to a situation in which actors' policies (pursued in their own self interest without regard to others) *automatically* facilitate the attainment of other's goals. . . . [C]ooperation and harmony are by no means identical and ought not be confused with each other. Cooperation requires that the actions of separate individuals or organisations - which are not in pre-existent harmony - be brought into conformity with one another through a process of negotiation.<sup>63</sup>

The process of negotiation is a central mechanism to develop and maintain the structure of relations between individuals or governments. Differences between actors may be apparent during this process although, as Sharman has argued, "[d]isharmony itself is only dysfunctional in a system typified by imposed rather than negotiated solutions."<sup>64</sup> The support given to intergovernmental agreements by

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<sup>62</sup> A. L. Fritschler and M. Segal "Intergovernmental Relations and Contemporary Political Science; Developing an Intergrative Typology", *Publius*, 1, 2 (Winter 1972): 95-122.

<sup>63</sup> Although concerned with international relations theory Keohane provides some useful insights into the differences between collaboration and co-operation. See R. Keohane, *After Hegemony: Cooperation and Discord in World Political Economy* (Princeton New Jersey: Princeton University Press, 1984): 51.

<sup>64</sup> C. Sharman, "The Premiers' Conference: Comments on Current Dissatisfactions", Paper for Workshop on Premiers' Conference CRFFR, ANU 1990.

both the Commonwealth and the States shows the efficacy of these arrangements in resolving differences arising from divided or overlapping responsibility. According to Chapman intergovernmental forums are "moderating institutions", reducing the tensions between different tiers of government<sup>65</sup> but at the same time enhancing the emergence of "executive federalism". The dominance of "executive federalism" in intergovernmental forums has, in reducing these tensions, raised other issues; most notably problems in accountability of intergovernmental arrangements.

Simeon's classic study of intra-nation "diplomacy" illustrated the importance of reducing conflict and establishing the basis for collaboration. Australian federalism offshore (detailed in following chapters) illustrates the utility of Simeon's conceptual framework. This perspective reinforces the view that intergovernmental negotiations are undertaken by individuals acting as emissaries of their "governments" to prepare and conclude agreements or treaties.<sup>66</sup> In extending this approach Warhurst argues that one of the roles of intergovernmental managers is to protect the interests of "their" jurisdiction during negotiations over joint action.<sup>67</sup>

Given the importance of individual actors, game theory and bargaining provide insights into the processes of intergovernmental negotiations. Bargaining analysis, based on an assumption that both

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<sup>65</sup> R.J.K. Chapman, "Intergovernmental Forums and the Policy Process" in B. Galligan, (ed.) *Comparative State Policies*, (Melbourne: Longman Cheshire, 1988): 199-121.

<sup>66</sup> See R. Simeon, *Federal-Provincial Diplomacy: The Making of Recent Public Policy in Canada*.

<sup>67</sup> J. Warhurst, "Managing Intergovernmental Relations" in H. Bakvis, and M. Chandler, (eds.) *Federalism and the Role of the State*, (Toronto, University of Toronto Press), 1987

parties see some advantage in entering into negotiations, allows consideration of the interplay between actors,<sup>68</sup> and the effect of external forces on altering the scope of the bargain. The development of intergovernmental agreements accommodating a number of different interests can also be seen as taking the form of "moves" within a "game" where each set of actors attempt to maximise their return from the bargaining table.

Several practical and methodological issues arise from the attempt to apply bargaining analysis and game theory.<sup>69</sup> Sharman, in examining Commonwealth - State relations as bargaining, shows how this framework can extend analysis of the dynamics of federalism but identifies one important limitation posed by the assumptions of bargaining analysis - the relative strength of each party to the bargain.<sup>70</sup> Rosenthal, similarly, claims that to equate

<sup>68</sup>For example, the options available to each to advance their interests or the constraints posed by the ability of other parties to counter or oppose these options.

<sup>69</sup>Game theory "is concerned with the actions of individuals who are conscious that their actions affect each other" - E. Rasmussen, *An Introduction to Game Theory*, (Oxford: Basil Blackwell, 1989): 21. These actions can be modelled as simple two person zero sum games through to "n-person" non zero-sum games or "cooperative game theory" - see P. Ordeshook, *Game Theory and Political Theory: An Introduction*, (Cambridge: Cambridge University Press, 1986). The latter approach approximates the dynamics of intergovernmental interaction. An early attempt to use game theory in the analysis of Australian federalism was made by Peachment who argued that game theory provides an interesting heuristic framework from which to examine the "patterns of conflict resolution in Australian federalism" - A. Peachment, "Patterns of Conflict Resolution in Australian Federalism", *Politics*, 6, 2, (1971): 137-147. Sharman criticised Peachment's analysis making the point that its assumption of bilateral relations between Commonwealth and a single State (a "two person game") ignored the significance of multilateral interaction and provided a superficial treatment of such interaction. G. C. Sharman, "The Bargaining Analogy and Federal State Relations" in R.M. Burns, G.C Sharman, G Stevenson, P.Weller and R.F.I Smith, *Political and Administrative Federalism*, Research Monograph No 14 CRFFR, (Canberra: ANU, 1976): 26.

<sup>70</sup>G.C. Sharman, "The Bargaining Analogy and Federal State Relations".



intergovernmental relations with bargaining obscures the significance of several factors including the impact of "anti-bargaining values" among intergovernmental actors or how transactions between parties may affect the nature of the bargain. Rosenthal also identifies problems arising from the existence of "a zone of indifference" in much of intergovernmental relations and the indeterminant character of such interactions.<sup>71</sup> Bargaining analysis and game theory do, however, draw attention to the dynamics of intergovernmental relations.

Another approach to modelling these processes was developed by Fritschler and Segal.<sup>72</sup> Fritschler and Segal claimed that although their four-part typology of intergovernmental relations "should be viewed as a first step" in a "systematic analysis of both vertical and horizontal variations in intergovernmental relations", it none the less "define[d] most of the conceivable political relationships within the intergovernmental system in a four-fold scheme of interaction".

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<sup>71</sup> D.B. Rosenthal, "Bargaining Analysis in Intergovernmental Relations", *Publius*, 10, 3 (Summer 1980): 33

<sup>72</sup> An early attempt to provide a typology of different intergovernmental interactions was made by Fritschler and Segal. The typology "contained four basic types of relationships":

- a. Joint policy making
- b. mutual accommodation
- c. Innovative conflict
- d. Disintegrative conflict

Joint (routine) policy making emphasises "pre-imposed and generally accepted procedures"; mutual accommodation; which is "slightly less cooperative is characterized by low keyed bargaining and harmonious compromise". Innovative conflict "starts with conflict and ends with cooperation" and disintegrative conflict is the type which includes ... instances of severe intergovernmental disagreements." A. L. Fritschler and M. Segal "Intergovernmental Relations and Contemporary Political Science; Developing an Integrative Typology", *Publius*, 1, 2 (Winter 1972): 95-122.

Fritschler and Segal's typology is less useful in modelling processes or dynamics, the situation where an issues may move over time from "severe intergovernmental disagreement" to "joint policy making". Thus any analytical framework needs to accommodate the range of strategies available to the various actors and acknowledge the impact of external influences, which, as Rosenthal identifies, can be antithetical to bargaining.<sup>73</sup> Placing claims over jurisdiction before the High Court may, for example, be a legitimate part of this interaction but formal zero-sum outcome of the judicial process has little in common with other aspects of bargaining.

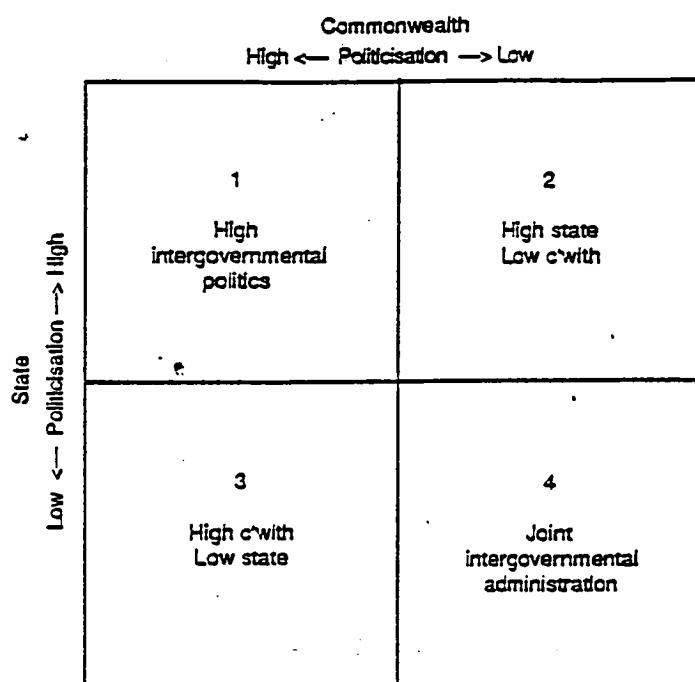
Galligan, Hughes and Walsh provide a useful contribution to the understanding of these dynamics by emphasising the importance of the extent to which intergovernmental issues are "politicised". This allows these issues to be categorised (in Australia at either Commonwealth or State level) on a continuum from "low" to "high" intergovernmental politics".<sup>74</sup> High intergovernmental politics arise over disputed claims to jurisdiction or through issues raised at peak intergovernmental forums. At the other end of the continuum are those issues "routinised in administrative structures and processes".<sup>75</sup>

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<sup>73</sup> D.B. Rosenthal, "Bargaining Analysis in Intergovernmental Relations": 7-8.

<sup>74</sup> B. Galligan, O. Hughes and C. Walsh, "Introduction", in B. Galligan, O Hughes and C. Walsh, (eds.) *Intergovernmental Relations and Public Policy*: 15.

<sup>75</sup> Ibid: 14.

Figure 1.1 Intergovernmental Relations and Issue Politicisation <sup>1</sup>

<sup>1</sup>B. Galligan, O. Hughes and C. Walsh, "Introduction" in B. Galligan, O. Hughes, and C. Walsh, (eds.) *Intergovernmental Relations and Public Policy*, (Sydney: Allen and Unwin, 1991): 15

This results in a four cell matrix, (see Figure 1:1) and although Galligan, Hughes and Walsh do "not ... suggest that there is a standard cycle from type 1 high politicisation to less politicised categories" they argue that it provides "a simple framework for analysing some dimensions of the character and dynamics of intergovernmental relations in Australia."<sup>76</sup> They also acknowledge that while "[c]ertain high level political issues of Australian federalism are resolved not by means of power assertion, bargaining and accommodation that are typical of the normal political process of relations between governments, but by independent bodies"<sup>77</sup> such as the High Court. Decisions from these independent bodies are, however, adjusted or

<sup>76</sup> Ibid: 15.

<sup>77</sup> Ibid: 16.

moderated by the process of Commonwealth - State relations. Galligan *et al* consider the offshore as an example of one "issue"<sup>78</sup> which indicates the extent of this political adjustment.

Such adjustment takes place through negotiations between Commonwealth and State Ministers and officials with similar policy responsibilities. The meetings of officials have had considerable impact on the development of intergovernmental agreements and resolution of intergovernmental problems as delegated by particular councils. The importance of the input from officials, together with the centrality of individual Ministers, reinforces Warhurst's contention that, notwithstanding the widespread use of the term this interaction should properly be seen as the inter-relationships between *individuals* rather than *governments*.<sup>79</sup>

Given the intergovernmental dimension of much of Australian public policy, ministerial councils cover a wide range of issue areas, with the resultant intergovernmental machinery particularly complex. The inter-meshing of intergovernmental responsibilities increases the importance of institutional arrangements which ensures that this machinery remains lubricated.<sup>80</sup> In identifying such

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<sup>78</sup> In accepting Galligan *et al* insights over intergovernmental dynamics a caveat remains over an interpretation of the offshore as a single issue area. This study argues that in fact the offshore illustrates the multi-faceted nature of much intergovernmental interaction.

<sup>79</sup> J. Warhurst "Managing Intergovernmental Relations": 257. The extent to which members of ministerial councils or their associated committees are able to make decisions binding on their respective governments is an interesting question. Later discussion will show that in relation to the OCS, agreements achieved at these meetings were adopted by, and seen as binding on, all governments.

<sup>80</sup> R. Wettenhall, "Intergovernmental Agencies: Lubricating a Federal System", *Current Affairs Bulletin* 61, 11, (April 1985): 28-35.

arrangements a useful distinction can be drawn between specialist *central intergovernmental agencies* and individuals at either tier of government who share membership of *policy specific councils* and associated committees. Such a dichotomy has been used by Warhurst in relation to Australia<sup>81</sup> and by Pollard in a study of intergovernmental relations in Canada:

where central agencies responsible for co-ordination of intergovernmental relations are more firmly entrenched than in Australia, their influence is seen as arising from the uncertainties of interdependent policy making. Through their capacity to coordinate interaction with other governments in all sectors, through their contacts and lines of communications with other governments, and through their abilities in developing strategy and negotiating, intergovernmental affairs agencies have helped governments reduce the uncertainty and to "manage" the interface.<sup>82</sup>

In Australia, like Canada, the development of the intergovernmental functions of central agencies at the State level derived from uncertainties arising from the politics of federalism. In Australia the imperatives created by the Whitlam government's new federalism encouraged the development of central agencies at the State level. Warhurst considers that these central agencies have had limited success in altering the entrenched patterns of interaction between Commonwealth and State departments (in Pollard's term "the interface") in policy specific areas. The linkages between functional departments are described as "rods of iron" whereas, in contrast, relations between individual departments and the central

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<sup>81</sup> J. Warhurst, *Central Agencies, Intergovernmental Managers and Australian Federal-State Relations*, Occasional Paper 29, CRFFR (Canberra: ANU, 1983).

<sup>82</sup> B. Pollard, *Managing the Interface: Intergovernmental Affairs Agencies in Canada*, (Kingston: Institute of Intergovernmental Relations, Queen's University, 1986): 109.

intergovernmental agency are seen as being quite fragile - "threads of gossamer".<sup>83</sup>

The linkages between between the Commonwealth and State Ministers reinforce, to use Warhurst's apposite metaphor of rods of iron, intergovernmental collaboration, and in turn strengthen established ministerial councils. The major study of intergovernmental forums undertaken by the Australian Council for Intergovernment Relations (ACIR) indicated that ministerial councils have several roles within the Australian federation. The ACIR study argued that such bodies had "regulatory, advisory, consultative, policy, reviewing, co-ordinating, and informing" functions within the Australian political system.<sup>84</sup>

The Premiers' Conference is the most publicised among a multiplicity of similar bodies - but at the same time can be seen as the *primus inter pares* of intergovernmental arrangements. Although the Premiers' Conference is an important institutional arrangement, it has been argued that this conference "can be seen to symbolize the Australian federal system - it works after a fashion, but it generates major dissatisfactions among the participants".<sup>85</sup> Many of these dissatisfactions arise from the relative power of the participants. With

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<sup>83</sup> J. Warhurst, *Central Agencies, Intergovernmental Managers*: 7.

<sup>84</sup> ACIR, *Operational Procedures of Interjurisdictional Ministerial Councils*, Information paper 13 (Hobart: Government Printer, 1986): 31.

<sup>85</sup> C. Sharman, 'The Premiers' Conference: Comments on Current Dissatisfactions'. It was this dissatisfaction which caused Premiers Goss and Greiner to suggest a far reaching reform of such arrangements was needed, a proposal which led to the "Closer Partnership" speech of Prime Minister Hawke in July 1990 and the convening of the Special Premiers' Conferences in 1990-91.

most (but not all) conferences dealing with financial matters<sup>86</sup> the Commonwealth has great influence. Notwithstanding the Commonwealth's dominance, the conflict (which is at times ritual) that is generated at, and by, the Premiers' Conference provides a further example of intergovernmental interaction.

The predominance of the Premiers' Conference arises from the political and policy implications of a meeting of "heads of government" and the importance of references from these conferences for the work of other councils. Almost all policy areas in Australia are served by what the ACIR termed "inter-jurisdictional ministerial councils."<sup>87</sup> ACIR identified thirty six formal ministerial councils, with a further nine meetings of ministers with informal or ad-hoc arrangements.<sup>88</sup> By the early 1990s the number of these councils had grown to 41, or perhaps 48 if associated forums are included.<sup>89</sup> The term "inter-jurisdictional ministerial councils" provides a specific, if cumbersome description of the meetings between Ministers of different (i.e. Commonwealth and state) jurisdictions. Although these

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<sup>86</sup> At times it is difficult to determine where the Premiers Conference ends and the Loan Council begins. The establishment of the Council of Australian Governments in 1992 provides an alternative forum for discussion on non-financial issues.

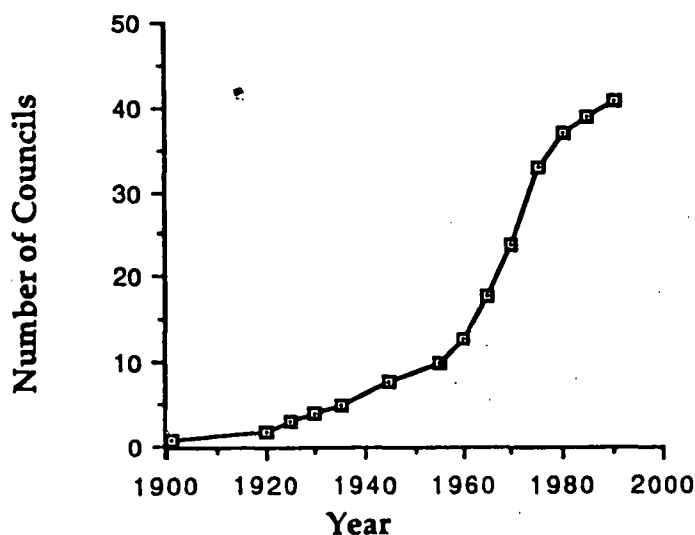
<sup>87</sup> ACIR, *Operational Procedures of Interjurisdictional Ministerial Councils*. See also R. Wettenhall, "Intergovernmental Agencies: Lubricating a Federal System".

<sup>88</sup> ACIR, *Operational Procedures of Interjurisdictional Ministerial Councils*, 2.

<sup>89</sup> C. Saunders Federalism Research Centre, Research Advisory Committee Meeting (7 June 1992), Canberra. See also *Weekend Australian* August 10-11 1991: 9.

ministerial councils follow generally the same institutional structure, they vary considerably in terms of their influence.

**Figure 1.2 Establishment of Ministerial Councils**



A great proportion (seventy per cent) of these councils were established in the 1970s and 1980s<sup>90</sup> (see Figure 1:2) and institutionalised Commonwealth - State relations, and more importantly ensured a continued role for the States in policy making, during a period of increasing Commonwealth assertiveness in particular policy areas.<sup>91</sup> The first ministerial council, apart from the Premiers' Conference and the constitutionally entrenched Loan Council established in 1929, was the Australian Agricultural Council (AAC) which had its first meeting in 1934. The AAC can be regarded as the prototype for subsequent

<sup>90</sup> ACIR, *Operational Procedures of Interjurisdictional Ministerial Councils*:2

<sup>91</sup> C. Sharman, "Fraser, the States and Federalism"; B. Galligan, "Writing on Australian Federalism: The Current State of the Art" and M. Painter, "Australian Federalism and the Policy Process: Politics with Extra Vitamins", *Politics*, 23, 2, (November 1988): 57-66.



councils.<sup>92</sup> In general, councils established in policy areas ranging from education to youth affairs followed the pattern established by the AAC in terms of membership, terms of reference, frequency of meetings, structure of advisory committees and functions. Each ministerial council comprises the appropriate Commonwealth and State Ministers, although increasingly specific forums include Ministers from Papua New Guinea and New Zealand.<sup>93</sup>

The terms of reference for most councils establish the forum as a means for formal consultation and co-ordination between the Commonwealth and States over policy.<sup>94</sup> ACIR found that "all but two [interjurisdictional ministerial councils] have directly associated, and subordinate, standing or advisory committees whose membership usually comprises the permanent heads of the departments of the ministers participating in the council."<sup>95</sup> The ministerial councils meet once or twice a year, except when major issues arise which deserve more attention. Much of the ongoing work of completing matters, providing advice or developing legislation is undertaken by the Commonwealth and State officials who meet generally at the same time as the Council but have their own ongoing and well defined patterns of interaction. The role of officials in the intergovernmental machinery cannot be understated; Wiltshire claims that "because of the

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<sup>92</sup> R. H. Leach, *Interstate Relations in Australia*, (Lexington: University of Kentucky Press, 1965): 50.

<sup>93</sup> Examples include the Standing Committee of Attorneys-General (SCAG) and the Australian and New Zealand Environment and Conservation Council (ANZECC).

<sup>94</sup> *Ibid.* For a more contemporary discussion of these issues see also M. Crommelin, "Commonwealth Involvement in Environment Policy: Past, Present and Future", *Environment and Planning Law Journal*, 4, (June 1987): 103 and R.J.K. Chapman, "Intergovernmental Forums and the Policy Process": 105-107.

<sup>95</sup> ACIR, *Operational Procedures of Interjurisdictional Ministerial Councils*: 23.

divisive politics of intergovernmental relations in Canada and Australia it is often the public servants which keep the federation hanging together."<sup>96</sup>

The studies by Leach <sup>97</sup> and ACIR provide important material on the influence of officials in intergovernmental relations. Leach surveyed a random sample of Commonwealth, State and municipal public servants and concluded that "[i]t would appear that Australian public servants at all levels found intergovernmental conferences useful, although municipal respondents seemed to think they are somewhat more matters of ritual or symbol than respondents at the other two levels".<sup>98</sup> The ACIR study indicated that Ministers' attitudes towards these committees "reveal a certain ambivalence about the degree to which the council directs the work of the committee or vice versa."<sup>99</sup> The technical and standing committees are particularly influential given the officials' direct expertise, knowledge and on-going contact with particular issues. Co-ordinating advice to Commonwealth and State Ministers is therefore an important function of the standing committees. In the case of federalism offshore the special committees comprising Commonwealth and State Solicitors-General<sup>100</sup> and the

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<sup>96</sup> K. Wiltshire, "Working with Intergovernmental Agreements", *Canadian Public Administration*, 23, 3, (Fall 1980): 354.

<sup>97</sup> R.H. Leach, *Perceptions of Federalism by Canadian and Australian Public Servants: A Comparative Analysis*, Research Monograph 18, CRFFR, (Canberra: ANU, 1976).

<sup>98</sup> R.H. Leach, *Perceptions of Federalism by Canadian and Australian Public Servants*: 75

<sup>99</sup> ACIR, *Operational Procedures of Interjurisdictional Ministerial Councils*: 24.

<sup>100</sup> The importance of the meetings of Solicitors-General will be highlighted in subsequent analysis. The issue of expertise in this case is emphasised by Coper who indicates that the Solicitors-General "these days dominate the arguments of constitutional cases" M. Coper, *The Curious Case of the Callow Crayfish: The New Law Relating to Section 92 of the Australian Constitution*, Discussion paper 1, 1989-90,

standing committees of the Australian Fisheries Council and the Australian Minerals and Energy Council provided legal and technical advice to the Standing Committee of Attorneys-General (SCAG) which made the OCS possible.

The role of officials in co-ordinating policy raises several issues, including compliance and accountability. To what extent are the decisions made at these committees binding on the members of the ministerial council or, more importantly, on the governments that they represent? A further issue concerns the level of parliamentary scrutiny of such decisions. If, as is generally the case, intergovernmental agreements are developed to avoid judicial adjudication of intergovernmental problems, attempting to hold the Ministers, or more problematically officials, accountable for their actions may be difficult.

Ministerial councils may therefore ensure a "lowest common denominator" or a "minimal tolerable consensus"<sup>101</sup> forms the basis of intergovernmental affairs. Thus the success of these intergovernmental forums in managing interjurisdictional policy making may be overstated. Chapman has cast doubt on the coordinating function of ministerial councils given the problems of consensus building and the possibility of unit vetoes. He also questions the extent to which ministerial councils can be seen as initiators of policy given that actions taken at such councils cannot be implemented without reference *back* to State or Commonwealth cabinets.<sup>102</sup>

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(Canberra: Department of the Parliamentary Library, 1989): 6.

<sup>101</sup> ACIR, *Operational Procedures of Interjurisdictional Ministerial Councils*, 1986 39.

<sup>102</sup> See R.J.K. Chapman, "Intergovernmental Forums and the Policy Process": 108.

Kriwoken, in a study of Australian marine conservation policy, shows that even where Commonwealth and State ministers agree on policy parameters, implementation of agreed measures does not necessarily follow.<sup>103</sup> The Premiers' Conference is perhaps an exception to this pattern as it is clear that it, with the numbers of public servants and advisors present, together with the authority of the State Premier within their own cabinet, provides greater scope for agreements to stick. For example the calling of a Special Premiers' Conference in October 1977 to discuss the offshore issue was of crucial importance in the development of the OCS. Similarly the ability of the Special Premiers' Conference (SPC) mechanism of 1990-91 to establish an agenda for reform of the Australian federal system indicates the importance of the Premiers' Conference, although assessment of the the long term achievements of the SPC is not yet possible.

Providing an institutional arrangement in which shared policy interests are the organising principle enhanced collaboration while at the same time enabling diversity in policy responses. Joint action is more probable where such forums exist and, arising from the sharing of responsibility between governments, the development of:

intergovernmental agreements now symbolise the symbiotic relationship which exists between the component parts of the ... federation..., a symbolism which is, politically, as important as their substance.<sup>104</sup>

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<sup>103</sup> L. K. Kriwoken, "Great Barrier Reef Marine Park: Intergovernmental Relations", *Marine Policy*, (September 1991): 349-362.

<sup>104</sup> Wiltshire lists thirteen reasons for the establishment of Australian intergovernmental agreements:

- (a) to achieve uniformity in the administration of a common functional area;
- (b) to avoid overlapping in the provision of administrative services;
- (c) to respond to vertical imbalance; i.e., to distribute surplus commonwealth

The language used to describe arrangements and agreements may contribute to this symbolism,<sup>105</sup> and mask substantial disputes or conflict among different parties. A range of devices may be used to establish these arrangements, with most involving some formal or informal intergovernmental agreement, although as Wiltshire comments "there is no semblance of any logical pattern nor are there any clearly defined models which are followed."<sup>106</sup> His conclusion arose from a detailed academic study, although now somewhat dated<sup>107</sup> in which he examined the types of intergovernmental

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- funds to needy areas of state government activity;
  - (d) to disseminate information nationally;
  - (e) to pool resources of governments for more effective administration;
  - (f) to apply laws to mobile resources (i.e., ones which transgress state boundaries);
  - (g) to achieve national solidarity;
  - (h) to promote research;
  - (i) to exhort the community on a vital issue;
  - (j) to achieve complementary action between governments;
  - (k) to review national priorities;
  - (l) to provide a solution to an otherwise insoluble or unconstitutional problem;
  - (m) to spy on other governments or to avoid being left out.

K. Wiltshire, "Working With Intergovernmental Agreements: the Canadian and Australian Experience": 361-362.

None of Wiltshire's categories are mutually exclusive and indeed the OCS illustrates that the desire to solve a "constitutional problem", in this case a decision of the High Court, also hinged on "complementary action between governments" to resolve disputes over State or Commonwealth "boundaries". K. Wiltshire, "Working With Intergovernmental Agreements- The Canadian and Australian Experience": 357.

<sup>105</sup> A prime example is the use of the term "Offshore Constitutional Settlement" when the arrangement was neither a constitutional development, nor a settlement of intergovernmental tensions. I thank Professor Deil Wright (April 1989) for his useful comments on the symbols enshrined in the language of intergovernmental affairs.

<sup>106</sup> K. Wiltshire, *Administrative Federalism*: 9.

agreements in a range of policy areas.<sup>108</sup>

Studying intergovernmental agreements in specific, highly contentious, policy areas such as the offshore reinforces the importance placed on multi-lateral forums such as the Premiers' Conference and other ministerial councils in resolving intergovernmental conflicts. Australian literature tends to see these councils as important, and influential in gaining commitments to, and *action* for, joint legislative or administrative arrangements. Canadian experience tends to

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<sup>107</sup> Wiltshire's study undertaken in the 1970s was complemented by the work of the short lived Advisory Council for Intergovernment Relations, (ACIR). ACIR, established under the Fraser Government's New Federalism policy, was abolished by the Hawke Government in 1987. ACIR provided a comprehensive listing of intergovernmental arrangements in its publication *The Register of Commonwealth-State Cooperative Arrangements 1985*, ACIR Information Paper No 10 (Hobart: Government Printer, 1985).

<sup>108</sup> The analysis enabled the Wiltshire to propose an inventory of the techniques under which these arrangements are established and administrative action is undertaken. These include:

- (a) Contracts signed by legal entities such as statutory corporations.
- (b) Formal written agreements for joint action signed by
  - (i) the Governor-General and/or Governor
  - (ii) the Prime Minister and/or Premier
  - (iii) the relevant national and/or State minister; or
  - (iv) permanent heads of relevant national and/or State administrative organisations
- (c) Memoranda of Understanding signed by any of the above combination of signatories
- (d) Constitutions of joint ministerial or administrative bodies
- (e) Charters for joint bodies that have their origin in other intergovernmental arrangements
- (f) The wording and occasionally the accompanying schedules of national or State Bills
- (g) Simple exchanges of correspondence
- (h) Informal discussions with no documented evidence of arrangements
- (i) Official annual and other reports of joint action.

Source: K. Wiltshire, *Administrative Federalism*: 9.

emphasise an opposing view:

[t]hroughout the 1970s the traditional mechanisms of ministerial and first ministers conferences contributed little in any direct way to the resolution of energy and natural resource issues. In the end most conflicts were either resolved through bilateral negotiations or pre-empted by unilateral action (usually by the federal government).<sup>109</sup>

The development of separate intergovernmental accommodations with Nova Scotia and Newfoundland over offshore oil and gas is an example of bilateral agreements in Canada. The eventual collapse of both the Meech Lake Accord<sup>110</sup> and the Charlottetown Accord<sup>111</sup> in Canada illustrates particular problems with, and concerns over the legitimacy of, Canadian multilateral executive federalism.

In Australia, however, it is unlikely that the OCS could have arisen without a Special Premiers' Conference referring the matter to the SCAG and the special committees of Solicitors-General. A major difference between the Canadian experience offshore and the success of the OCS relates in part to the multi-faceted, multilateral character of the Australian offshore "problem". This made it difficult, if not

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<sup>109</sup> F.J. Fletcher and D.C. Wallace, "Federal-Provincial Relations and the Making of Public Policy in Canada: A Review of Case Studies" in R. Simeon, (Research Co-ordinator) *Division of Powers and Public Policy*, Research Studies of the Royal Commission on the Economic Union and Development Prospects for Canada, (Toronto, University of Toronto Press), 1986.

<sup>110</sup> The Meech Lake Accord was an agreement between the Provincial premiers and Canadian Prime Minister Mulroney to enable Quebec to ratify the 1982 patriated constitution. Although gaining unanimous agreement at first ministers' conferences the Accord collapsed. A substantial Canadian literature has examined the development and demise of the Meech Lake Accord.

<sup>111</sup> The Charlottetown Accord arose out of the Canadian government's "Canada Round" of constitutional reform proposals of 1991-92, and was defeated at a popular referendum in October 1992.

impossible, to establish a series of bilateral agreements.<sup>112</sup> This in turn enhanced the ability of the States to place significant limitations on unilateral Commonwealth action, particularly given the opportunity offered by the Fraser government's New Federalism. As the empirical material presented in following chapters illustrates, the OCS was influenced more by State or Commonwealth officials than by the State and Commonwealth ministers, although the actions of State Premiers such as Sir Charles Court from Western Australia, and Mr Rupert Hamer from Victoria in initiating the process of negotiation, and the close interest of Prime Minister Fraser in maintaining this process cannot be underestimated. In spite of concerns over the operation of ministerial councils such intergovernmental forums can be particularly influential in providing opportunities for discussions outside the often adversarial politics of Commonwealth - State relations

### **The Politics of Commonwealth State Relations**

It is a truism that federalism enhances the development of a number of countervailing forces which are in a constant dynamic. The constitutional division of powers is subject to the processes of judicial review; the development of intergovernmental agreements counter the disintegrative conflicts emerging from struggles over jurisdiction. In the same manner the intergovernmental machinery moderates the politics of Commonwealth - State relations.

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<sup>112</sup> Chapter Four does indicate, however, that the implementation phase of the OCS tended to focus on individual sectors within the settlement.



Commonwealth - State relations have long been a permanent item on the Australian political agenda, although at times specific political conflicts between the Commonwealth and individual State governments have emerged to dominate and shape Australian federalism. While such conflicts have had a partisan flavour as exemplified, for example, by the conflicts in the early 1970s between the Queensland National - Liberal coalition government led by Premier Joh Bjelke-Petersen and the Whitlam led ALP Commonwealth government, a broad brush partisan explanation cannot explain the equally savage conflicts between the Tasmanian ALP Premier Eric Reece and Whitlam during the same period. A simple partisan explanation cannot explain the Fraser government's problems with the Bjelke-Petersen government over the management of the Great Barrier Reef.

The partisan thesis is flawed as an explanation of intergovernmental conflict or of attitudes to federalism. It is too simplistic to equate the ALP as a party committed to centralisation and the anti-Labor parties of a stronger commitment to federalism. It is true that the ALP remained suspicious of the limits posed on its reform agenda by the constitution<sup>113</sup> with Party platform maintaining a formal commitment to abolish the Senate until 1979. The ALP, emerging at the same time as the 1890 constitutional conventions, had no part in drafting the Constitution, with the labour movement's opposition to federalism in the 1890s evident through such publications as *The Tocsin*.<sup>114</sup> The period immediately after federation saw the ALP adapt quickly to the

<sup>113</sup> See for example the 1957 Chifley Memorial Lecture in E.G. Whitlam, *On Australia's Constitution*, (Melbourne: Widescope, 1977).

<sup>114</sup> H. Anderson, (ed.) *Tocsin: Radical Arguments against Federation*, (Melbourne: Drummond, 1977).

federal framework with the first Commonwealth ALP ministry under J. C. Watson elected in 1904. The strengthening of the Senate in the mid 1960s as a result of the reforms initiated by Senator Murphy as ALP Senate Leader and the maturing of the ALP's attitude to federalism in the 1980s are examples of the ALP's ability to work within the federal system although the events of the November 1975 dismissal of the Whitlam government also saw calls for a reform of the constitution. The agenda for constitutional reform took an intergovernmental flavour under the Whitlam government's ill-fated constitutional convention of 1973-74, although this process was initiated by State governments in response to criticisms of the Gorton Coalition treatment of the States.<sup>115</sup> The Hawke government's half-hearted attempt at constitutional change with the 1988 package of referendums - soundly rejected by the Australian people - encouraged a non-partisan reform process of much greater significance.

The Hawke government's "practical reconciliation with federalism"<sup>116</sup> is evidence of the decline in the ALP's criticisms of the constitutional framework. Hawke's shift from an espousal of traditional Labor orthodoxy regarding the "anachronistic lunacy" of the federal system in his 1979 Boyer lectures<sup>117</sup> to his support of the new federalism of 1990 - 91 is an interesting example of this change.<sup>118</sup> Understanding the opportunities afforded by the federal system enabled the Hawke

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<sup>115</sup> See M. Haward and G. Smith "What's New about the New Federalism?" *Australian Journal of Political Science*, (November 1992) - Forthcoming.

<sup>116</sup> B. Galligan and D. Mardiste, "Labor's Reconciliation with Federalism" *Australian Journal of Political Science*, 27, 6, (March 1992): 71-86.

<sup>117</sup> R.J. Hawke *The Resolution of Conflict*, 1979 Boyer Lectures, (Sydney: ABC, 1979).

<sup>118</sup> B. Galligan and D. Mardiste, "Labor's Reconciliation with Federalism".

government to work within the constitution which after all did not hinder major macro-economic policy objectives.<sup>119</sup>

The reinforcement of the external affairs power in the *Franklin Dam* case enabled the Commonwealth to extend its influence in areas such as environmental and heritage protection, although it had to account for increasingly assertive (and generally ALP) State governments in the mid to late 1980s. This outcome was arguably an inevitable response to a continual growth in central power and influence (which had begun decades earlier, and had been foreshadowed by Deakin in 1904<sup>120</sup>) which reflects the inherent dynamics of federalism. Acknowledging such dynamics helps to explain the ALP's reconciliation with federalism. Having witnessed an attempt at greater central involvement under the Whitlam government's new federalism collapse in the face of the opposition from ALP State governments (with the politics of Commonwealth - State relations cutting across partisan cleavages) the Hawke government undertook a more pragmatic approach to the federal arrangement.

The Liberal Party has retained a longstanding commitment to the federal system. However, with some exceptions (in the case of the time, energy and determination which followed the Fraser New Federalism)<sup>121</sup> this commitment has remained as part of the Liberal party's "theology".<sup>122</sup> Menzies, after all, was Prime Minister during

<sup>119</sup> M. Stuchbury's discussion of macroeconomic policy making in a recent review of the Hawke government does not mention the States, nor the effects of federalism; see "Macroeconomic Policy" in C. Jennert and R.G. Stewart *Hawke and Public Policy: Consensus and Restructuring*, (Melbourne: Macmillan, 1990).

<sup>120</sup> A. Deakin, *Federated Australia: Selections of Letters to the Morning Post 1900-1910* ed. J.A. LaNauze (Melbourne: Melbourne University Press, 1968).

<sup>121</sup> C. Sharman, "Fraser, the States and Federalism".

much of the period where what he described as the growth of "central power" occurred,<sup>123</sup> and had played a significant role as counsel for the plaintiff in the important *Engineers* case in 1920. The Liberal Party's commitment to federalism was to be reshaped by Gorton who had a more assertive view of the Commonwealth's role which, together with his attempts at reforming the party, led to internal conflict and his replacement as Prime Minister. Intense opposition, for example, emerged to Gorton's proposal for greater Commonwealth jurisdiction in offshore Australia and in areas such as the Great Barrier Reef.

From the perspectives of the States the politics of Commonwealth - State relations are less important for partisan considerations than for the opportunities for opening up alternative arenas in which to maintain State interests. Thus this interaction is a way of pressuring the Commonwealth on particular issues, where the drama is directed back at the State, with State electors rather than the Commonwealth being the primary audience.<sup>124</sup> Given the current pattern of fiscal federalism and the dependence of the States for grants to fund a range of programmes, the Commonwealth will always be the convenient target. State Premiers are able to use the politics of intergovernmental conflict to their own advantage, with the Commonwealth treatment of particular States being a perennial election issue.<sup>125</sup> The politics of

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<sup>122</sup> D. Jaensch, "The Liberal Party" in D. Woodward, A. Parkin and J. Summers, (eds.) *Government, Politics and Power in Australia*, 3rd ed. (Melbourne, Longman Cheshire, 1985): 137-152.

<sup>123</sup> See R.G. Menzies *Central Power in the Australian Commonwealth*.

<sup>124</sup> For discussions on the Premiers' Conference see J. Holmes and C. Sharman *The Australian Federal System*, (Sydney: George Allen and Unwin, 1977): C. Sharman, *The Premiers Conference: An Essay in Federal-State Interaction*, Occasional paper 13 Political Science Department Research School of the Social Sciences (1977) and C. Sharman, "The Premiers' Conference: Comments on Current Dissatisfactions".

<sup>125</sup> Elections in Queensland in 1974 and Tasmania in 1979 were primarily fought on the

Commonwealth - State relations tend to be in stark contrast to the other forms of intergovernmental interaction, particularly the meetings of Commonwealth and State officials. While the political disputes rage it is the intergovernmental machinery which ensures joint action, albeit at times what may be felt by some to be "a minimum tolerable consensus". This machinery provides an effective foil for the conflicts engendered in the politics of Commonwealth - State relations, yet like the other parameters of intergovernmental interaction is based on the constitutional, political and administrative recognition of State interests and responsibilities..

### **The Commonwealth, the States and the Offshore**

The preceding discussion has centered on examining the range of arrangements and processes which initiate, limit and facilitate the interaction between the Commonwealth and the States.<sup>126</sup> Focusing solely on the expansion of Commonwealth power and influence, or on the decisions of the High Court, tends to ignore the countervailing influences which make these arrangements and processes means for ongoing interaction rather than ends in Commonwealth - State relations. It is the countervailing influences arising from the division of powers which contribute to what Rosenthal and Hoelfer term the "structure of relations" making the States' constitutional and political powers and interests a central focus in intergovernmental interaction.

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Commonwealth's treatment of the respective States.

<sup>126</sup> In a recent article Painter considers the effect of the "extra vitamins" introduced by federalism, or more specifically by intergovernmental interaction, into the Australian policy process. He argued that the effect of these "extra vitamins" could be illustrated by Commonwealth government intervention in specific policy areas. See M. Painter, "Australian Federalism and the Policy Process: Politics with Extra Vitamins", *Politics*, 23, 2, (November 1988): 57-66.

Such interaction establishes the States as major actors in any intergovernmental arrangement, and act as a foil to interpretations of such arrangements as based solely on the perceived expansion of Commonwealth jurisdiction.

Despite expansion of Commonwealth jurisdiction by the High Court the States remain significant actors in establishing and implementing intergovernmental arrangements over the offshore. The following chapter argues that the increased Commonwealth involvement in domestic policies associated with the development and exploitation of marine resources was closely linked to broader moves to assert national jurisdiction over the continental shelf as part of the developing international law of the sea. In spite of the Commonwealth's primacy in matters of external affairs, Commonwealth - State relations over the offshore were both informed and constrained by the political and administrative arrangements arising from the constitutional separation of responsibilities within the Australian federal system.

## Chapter Two

### The Commonwealth, The States, and Offshore Jurisdiction:

1901 - 1975

Since 1901 in theory,<sup>1</sup> and from the 1950s in practice, both the Commonwealth and each State government have exercised jurisdiction, based on concurrent constitutional powers, over Australian offshore fisheries. The Commonwealth derives its power from Section 51 (x) of the Constitution, while the States' jurisdiction over fisheries is linked to the "peace order and good government provisions of their constitutions. Jurisdiction over other offshore resources such as oil and gas was less clear and, as a result, led to contending claims between the Commonwealth and the States. The States' argument that jurisdiction over offshore oil and gas rested with them was based on an interpretation of the residual powers doctrine and their extensive involvement in terrestrial mineral resource management. As with the management of fisheries, the States' activities in regulating mining predated federation. The extensive intergovernmental interaction which has taken place in Australia over the offshore (particularly in the 1960s and 1970s) arose from the States'

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<sup>1</sup> Prior to federation a quasi-federal arrangement (the Federal Council of Australasia) enabled colonies to claim an extra territorial competence to legislate over fisheries beyond the three mile limit.

perceiving their interests conflicting with an expansion in Commonwealth activity.

While the struggle over jurisdiction offshore in Australia primarily concerned domestic issues this intergovernmental interaction was, however, greatly influenced by developments in the United States and Canada and the emerging international law of the sea.<sup>2</sup> These external influences had the effect of altering the relative strengths of either the Commonwealth or the States in intergovernmental negotiations during this period. The study of Australian federalism offshore reinforces Fairley's comment concerning fisheries management in Canada:

[i]n this domain the international public law of the ocean also governs; it demands both understanding and an adequate appreciation before the domestic constitutional issues can be properly analysed and decided. *More simply, the domestic issue is not merely domestic.*<sup>3</sup>

The impact of such factors as changes in the law of the sea on domestic politics and administration is more readily apparent when they are used to challenge existing Commonwealth - State relations. Attempts to

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<sup>2</sup> The pattern of Australian intergovernmental interaction over the offshore paralleled similar conflicts in the United States and in Canada, although the outcomes in each federation reflect the impact of particular domestic political and policy imperatives. In both the USA and Canada the Supreme Court has upheld federal power offshore over claims from either States or Provinces. The development of international conventions over the continental shelf and the emergence of customary international law over extended jurisdiction offshore from coastal states emerging from the declaration of jurisdiction over fisheries up to 200 miles offshore by Chile, Ecuador and Peru in 1952 and from the deliberations at UNCLOS I (1958); UNCLOS II (1960) and UNCLOS III (1974-82).

<sup>3</sup> H. S. Fairley, "Canadian Federalism, Fisheries and the Constitution: External Constraints on Internal Ordering" *Ottawa Law Review*, 12, (1980): 290.



expand the reach of Commonwealth's powers offshore by reference to developments in the law of the sea, therefore upsetting the division of responsibility between Australian governments, may be one source of challenge to the *status quo*. Where jurisdiction is unclear an emergent interest by the Commonwealth may be attached to claims arising from developments in the international law of the sea, as for example in the Commonwealth's increased interest in offshore oil and gas. Even where a constitutional power is shared, as in the case of fisheries, the development of such international regimes may encourage greater Commonwealth interest in expanding its day to day responsibilities.

Intergovernmental relations over offshore areas in Australia can be conceptualised as forming four periods in the century to the early 1990s. Each of the parameters of the analytic framework in the previous chapter emerges as a central feature of one period. Intergovernmental interaction between the 1880s and the late 1940s focused on the establishment and operation of the constitutional division of powers. The second period - between the early 1950s to 1969 - saw the Commonwealth and State governments consolidate joint action over offshore resources through the emergence of intergovernmental institutions and processes. 1970 to 1975, the third period, saw the earlier accommodation unravel giving a period of conflict characterised by divisive political relationships between the Commonwealth and the States and eventual judicial adjudication of the contending claims over jurisdiction. The fourth period (1976 to the early 1990s) is characterised by on-going intergovernmental negotiation to establish an agreement which entrenched joint action in the offshore as well as a recognition of concurrent roles and responsibilities.<sup>4</sup>

### The Constitutional Division Of Powers Offshore

Fishing was an important activity in each of the "Australian" colonies with each colonial legislature enacting various measures to regulate and control the fisheries in adjacent waters following the granting of responsible, but limited, self government in the 1850s. Colonial fisheries legislation contained some degree of "extra-territorial competence" although the reach of this legislation was rarely tested. In the latter part of the nineteenth century, however, some conflicts emerged between the colonies over the adoption of different management practices in similar fisheries - a problem, incidentally, that was to bedevil the implementation of the fisheries elements of the OCS almost a century later. The major intergovernmental skirmish in the 1890s was between Victoria and Tasmania over the use of "pots" in the "crayfish" or southern rock lobster fishery.

In Australia it is noteworthy that intergovernmental, or more correctly inter-colonial, interaction over control of coastal waters pre-dated federation in Australia; the Federal Council of Australasia established, albeit in a limited manner, that offshore resources legislation would incorporate a "federal framework". Almost a century after the intriguing developments by the Federal Council the proclamation of the *Coastal Waters (State Titles) Act* 1980 (Cwth) entrenched the OCS and established a robust "sea wall" to stabilise the federal institutions and processes in the offshore. Thus the OCS needs to be placed in context as an outcome of intergovernmental interaction arising generally from the States' response to assertions of Commonwealth

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<sup>4</sup> The continued intergovernmental interaction between 1975 and 1990 is discussed in the following chapters.

constitutional power and political influence in the territorial sea, concerns which predate the proclamation of the *Commonwealth of Australia Constitution Act 1990* (Imp.).

The exploitation of particular fisheries outside the three mile "cannon shot limit" of territorial waters seen as the customary limit of colonial legislation raised particular problems for some Australian colonies. Concern over the limited competence of Queensland and Western Australian colonial fisheries legislation to regulate foreign fishermen in the pearl and beché de mer fisheries was resolved by the development of legislation under the auspices of the Federal Council of Australasia. This legislation indicates that the question of legislative competence was the concern of particular colonies although it also reflects an ignorance of contemporary British judicial developments concerned with jurisdiction in coastal waters, particularly the impact of the *Franconia* case (*R. v. Keyn*)<sup>5</sup> of 1876.

The *Franconia* was a British registered vessel which was involved in a collision with a foreign vessel within the customary three mile limit of national jurisdiction from the British coast. The loss of life resulting from the collision indirectly led to questions of the "extra-territorial competence of British legislation and the jurisdiction of British courts".<sup>6</sup> Not surprisingly the decision in *R. v. Keyn* was to have

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<sup>5</sup> One of the most concise summaries of the *Franconia* case was developed by Sir Percy Spender in "The Great Barrier Reef: Legal Aspects" in *The Future of the Great Barrier Reef*, (Sydney: Australian Conservation Foundation, 1969). D. P. O'Connell argues that "[t]he law as declared in *R. v. Keyn* in 1876 seems to have fixed the low water mark as the seaward boundary of the realm." "Australian Coastal Jurisdiction" in D. P. O'Connell, (ed.) *International Law: Australian Essays*, (Sydney: The Australian Institute of International Affairs/Law Book Company, 1965: 249.

<sup>6</sup> P. Spender, "The Great Barrier Reef: Legal Aspects."

significant bearing on future legal decisions in Australia and Canada through the next one hundred years. The impact of the decision at the time was, however, limited as the British parliament enacted the *Territorial Waters Jurisdiction Act* in 1878; legislation which removed problems posed by the decision in *R. v Keyn*. Thus although the *Franconia* case was (and remains) a key legal decision, its significance is debated by commentators.<sup>7</sup>

The regulation of fisheries was one of a series of factors which "had brought the colonies - or a majority of them - closer together".<sup>8</sup> In 1883 the establishment of the Federal Council of Australasia arose in response to the emergence of a tentative national sentiment from within the "Australian" colonies. These colonies, together with New Zealand and Fiji, agreed to explore matters of common concern. A convention led to the adoption of a resolution which stated:

[t]hat this Convention, recognizing that the time has not yet arrived at which a complete federal union of the Australasian colonies can be attained, but considering that there are many matters of general interest with respect to which united action would be advantageous, adopts the accompanying draft Bill for the

<sup>7</sup> For example Spender argued that "[T]he reasons on which it is based ... at the barest minimum are destructive of any claim by any Australian colony to exploit the seabed of whatever could be claimed to have been their territorial waters in 1901." "The Great Barrier Reef: Legal Aspects": 31. His interpretation of the *Franconia* case was not universally supported. O'Connell developed an argument supporting the States' legislative competence in the territorial sea; that "colonial legislatures had competence over territorial waters because they were exercising over them the particular jurisdiction necessary for the 'peace, order and good government' of the colonies, not because the waters were within their boundaries." "Australian Coastal Jurisdiction": 254. O'Connell was to have considerable influence in preparing opinions for first the South Australian and then the Queensland and Tasmanian governments in the 1970s.

<sup>8</sup> R. Else-Mitchell, "The Establishment in 1885 of the Federal Council of Australasia" *Australian Law Journal*, 59 (November 1985): 666.

Constitution of A Federal Council, as defining the matters upon which such united action is both desirable and practicable at the present time.<sup>9</sup>

The parliaments of the colonies of Queensland, South Australia, Tasmania, Victoria, Western Australia and Fiji "adopted addresses to the crown praying for enactment of the Federal Council of Australasia Bill" in 1884.<sup>10</sup> This legislation was passed by the Imperial Parliament and assented by Queen Victoria in 1885. With New South Wales (and to a lesser extent New Zealand) failing to concur with the views of the other colonial parliaments, the ability of the Federal Council "to achieve objectives commensurate with the hopes of its framers" was to be frustrated.<sup>11</sup>

The Federal Council of Australasia owed much to the energy, foresight and practical concerns of the Queensland Premier Sir Samuel Griffith,<sup>12</sup> who was later to play an important role in the framing of the Australian constitution. Griffith's concerns over the impact of foreign fishermen in Queensland waters may explain the provision of the Federal Council's fisheries power. The Queensland and Western Australian colonial parliaments utilised this provision to extend (or perhaps more correctly to *claim*) colonial legislative competence over the beché de mer (trepan) and pearl fisheries outside the three mile limit in response to activities by Japanese and Timorese fishermen. Else-Mitchell notes the centrality of these issues - in "explaining the purpose of the Council to the Premier of New Zealand in a letter dated May 20 1885, the Premier of Victoria said that it was to give power to

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<sup>9</sup> Ibid. 667.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid. 666. See also B.W. Davis, "The Federal Council of 1886: Catalyst Towards Australian Nationhood" mimeo, Royal Australian Institute of Public Administration Tasmanian Division, 4th February 1986.

legislate for fisheries outside the territorial waters where at present there was no jurisdiction."<sup>13</sup>

Apart from enabling the development of a quasi-federal arrangement concerning fisheries legislation the Federal Council power "over fisheries in Australasian waters beyond territorial limits" was adopted in the draft constitution bill debated during the first National Australasian Constitutional Convention in Sydney in 1891. This provision, although subject to minor amendments in 1898, formed the basis of Section 51 (x) of the Australian constitution.

The analysis of the the convention debates provides an insight into the framers' perception over the operation of the Australian federal system.<sup>14</sup> In relation to the "fisheries power" these debates illustrate how most delegates envisaged a concurrent system of legislation retaining a significant, if not primary, role for the States. This emerged despite the dominance of the Brycean interpretation of the American division of powers,<sup>15</sup> as reinterpreted by key actors of the first convention such as Griffith, Kingston and Inglis Clark.<sup>16</sup> Not unexpectedly this arrangement led to quite extensive interaction between the States and the Commonwealth over fisheries management prior to the enactment of specific Commonwealth legislation in the

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<sup>13</sup> D. P. O'Connell, "Australian Coastal Jurisdiction", 255.

<sup>14</sup> For a detailed exposition of this argument see J. Warden *Federal Theory and the Formation of the Australian Constitution*, unpublished PhD thesis, (Australian National University, 1990).

<sup>15</sup> Ibid.

<sup>16</sup> Inglis Clark, a Tasmanian delegate to the 1890 and 1891 meetings was a strong supporter of the United States constitutional structure and opposed a Canadian style division of powers. At the 1890 Melbourne Conference Inglis Clark, with Playford, was responsible convincing delegates of the flaws in a Canadian constitutional model.

1950s.<sup>17</sup>

The convention debates emphasise the delegates' concern to retain, as far as possible, existing responsibilities related to fisheries management. Some delegates to the first convention voiced concern over the effect of the repeal of the *Federal Council of Australasia Act* on fisheries, but were reassured by Griffith that this would not affect state law.<sup>18</sup> Although other matters took up much of the discussion over the powers of the Commonwealth in the 1891 and 1897 sessions, the Melbourne session of the second convention in March 1898 provided a relatively lengthy discussion of the wording and implications of the provision which later became Section 51 (x); "fisheries in Australian waters beyond territorial limits". This was the only session which considered the implications of extra-territorial competence of State law or the limits on Commonwealth power. According to O'Connell the fisheries power (placitum x) was "adopted word for word from the powers given to the Federal Council of Australasia".<sup>19</sup> The drafting history outlined by Quick and Garran, and in the more recent analysis by Crommelin, has emphasised the scant attention the provision gained at the early meetings of the Convention.<sup>20</sup> O'Connell indicates that

[a]t the Adelaide meeting in 1897 discussion was directed solely to the policy of federal control of inland fisheries, and no reference was made to territorial waters. At the Sydney meeting the debate turned on the definition of "Australian waters". It was only at

<sup>17</sup> A. J. Harrison, "The Development of the Commonwealth Government's Role in Fisheries Management", Mimeo, (Hobart: Department of Political Science University of Tasmania, 1989).

<sup>18</sup> *Official Record of the Debates of the National Australasian Convention* (Sydney 1891): 557-560.

<sup>19</sup> D.P. O'Connell, "Australian Coastal Jurisdiction": 256.

<sup>20</sup> J. Quick, and R.R. Garran, *The Annotated Constitution of the Commonwealth of Australia*, (Sydney: Angus and Robertson, 1901); M. Crommelin, *Offshore Mining and Petroleum: Constitutional Issues*, Papers on Federalism 3 Intergovernmental Relations in Victoria Program (Melbourne: Melbourne University Law School, 1981).

Melbourne [in 1898] that the question of colonial jurisdiction in territorial waters was raised, and it was treated in a casual and uncritical manner.<sup>21</sup>

An examination of the convention debates reinforces O'Connell's argument but it is also clear that the legal bases to Section 51 (x) *were* considered by Barton and Isaacs. Equally other delegates<sup>22</sup> at the convention (in particular Forrest and Deakin) were concerned with the wording, and therefore the reach, of this power. While Barton and Isaacs debated the intricacies of what was to become Section 51 (x), Forrest and Deakin were more directly concerned with how this provision would affect State activities over fisheries.

Barton, concerned with the problems of enforcing section 51 (x), tabled an amendment to the provision adding "sea" before "fisheries" and deleting "beyond territorial limits". The implications of this amendment were not lost on Sir John Forrest, Premier of Western Australia. Forrest opened debate on the amendment with the following question to Barton:

I would like to ask Mr Barton whether it is intended to take away the state control of fisheries by this clause? . . . It would not be desirable to take away any power from the state of legislating in regard to these [inshore] fisheries. The words "beyond territorial limits" which it is proposed to omit, are very good words. The Federal Council, under the Imperial Act, has exercised the power of legislating for waters beyond territorial limits with great advantage to some colonies. Western Australia and Queensland

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<sup>21</sup> D.P. O'Connell, "Australian Coastal Jurisdiction": 256.

<sup>22</sup> The members of the 1891 Convention were officially recognised as "delegates" while in 1897 and 1898 they were officially "representatives", although it is common to use the former term in relation to the 1897 and 98 conventions, see B. Galligan and J. Warden, "The Design of the Senate" in G. Craven (ed.) *The Convention Debates 1891-98: Commentaries, Indices and Guide* (Sydney: Legal Books, 1986): 89.



have both Acts of the Federal Council which have been very useful in controlling fisheries, such as pearl fisheries, far beyond the 3-mile limit.<sup>23</sup>

Barton argued that there was limited effective legislation which could be used to regulate fisheries beyond territorial limits, with the exception of the commercial activity of selling fish. Barton, foreshadowing the problems of overlapping responsibility between the Commonwealth and the States, commented:

a law giving such a right had better not be subject to conflict. If you have a state law for fisheries within the 3-mile limits under the state and a commonwealth law beyond the 3-mile limit, the unlucky fisherman who does not always know whether he is 2 1/2 or 3 miles away will get into the pickle instead of his fish.<sup>24</sup>

In response to the particular query raised by Sir John Forrest, Barton added:

I quite agree that every state has the right to legislate as to its own fisheries within the territorial limits of three miles, but it has no right to legislate beyond that limit. . . . That is why I have proposed [the addition of] "sea fisheries". It will allow the Commonwealth to legislate with regard to the whole area.<sup>25</sup>

Barton went on to explain the reasoning behind his amendment; "[i]f you insert the word "sea" before the word "fisheries" and leave out the rest of the provision you leave one jurisdiction with regard to the legislation and get something clear, and something which the persons conducting the fishing business can understand."<sup>26</sup> Barton's concern

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<sup>23</sup> *Official Record of the Debates of the National Australasian Convention, Third Session* (1898): 1857.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid* 1857-58.

<sup>26</sup> *Ibid* 1858.

to reduce conflict over jurisdiction contrasted with the views of other delegates concerned with minimising the loss of colonial power over fisheries.

Given Forrest's objections, Barton indicated that if the amendment was worrying delegates he would be quite prepared to argue that the particular provision be removed entirely, leaving fisheries, by implication, solely a matter for the States. Barton said "I shall move the amendment which I have suggested, but I should be just as content if the whole of the subsection was struck out."<sup>27</sup>

Although this would have satisfied the delegates concerned with maintaining state "rights",<sup>28</sup> Barton's proposal to remove the subsection was opposed by several influential delegates. Higgins drew attention to the fact that the Commonwealth power could stop inter-state conflict over fisheries; citing the then recent conflict between Tasmania and Victoria over rock-lobster fishing<sup>29</sup> as an example of the potential role for the Commonwealth. Kingston urged the retention of the Federal Council power, adding that most arrangements using this power tended to be developed in a co-operative manner. He argued that in terms of "the possibility of clashing of state regulations and federal legislation, my recollection and experience is that this legislation is generally prompted by the state which is nearest to the fisheries

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<sup>27</sup> Ibid.

<sup>28</sup> Neasey argues that key framers, such as Inglis Clark and Barton rejected the concept of States "rights" and preferred the notion of State "interests"; J. M. Neasey "Andrew Inglis Clark Senior and Australian Federalism" *Australian Journal of Politics and History*, 15, 2 (1969): 1-24.

<sup>29</sup> A.J. Harrison, "Management in the Context of the South-East Australian Fishery", *Victorian Southern Rock Lobster Fishery Seminar*, (June 1977).

concerned, and that it simply harmonizes with the local legislation on the subject."<sup>30</sup> Almost a century later the aim of harmonising legislation was the driving force behind intergovernmental fisheries arrangements within the OCS.

Several delegates argued that enforcement of Commonwealth legislation would prove to be a prohibitive cost, and that the States were best suited to manage fisheries and enforce regulations. Deakin assured Forrest that the States would retain influence over fisheries, and made a typically pertinent and prescient observation on the implementation of the fisheries power:

it is only a concurrent power which is proposed. Until the Federal Parliament chose to exercise it the power of control in the several states would absolutely remain. I have no doubt that the control of fisheries within territorial limits would remain with them for all time.<sup>31</sup>

Although Deakin's comments indicate that he was unfamiliar or unconcerned over the result of *R. v. Keyn* in terms of the boundary of colonial/State limits, his views on concurrent responsibilities were important issues in the implementation of the OCS framework in fisheries. It is important to record the *Seas and Submerged Lands Act* 1973, which the States opposed, had none the less specifically included "savings provisions" to maintain State legislative responsibilities over fisheries.

The fisheries power, and particularly the meaning of the term "beyond

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<sup>30</sup> *Official Record of the Debates of the National Australasian Convention* Third Session (1898): 1859-60.

<sup>31</sup> *Ibid*, 1864-65.

territorial limits", has not been directly considered by the High Court, although several cases have raised issues related to the boundary between State and Commonwealth jurisdiction.<sup>32</sup> Individual members of the High Court have interpreted the power to mean "beyond the three mile territorial sea",<sup>33</sup> although others have opposed such an interpretation, leading Zines to observe that "the correct construction of s 51 (x) in this regard seems at present unresolved".<sup>34</sup> The High Court's support for the fisheries arrangements established under the OCS in the *Port Macdonnell* case, and the Court's earlier support for State fisheries legislation maintained by the savings provisions in the *Seas and Submerged Lands Act 1973* in *Pearce v. Florenca*, have reduced the likelihood of the Commonwealth raising the issue of the extent of the fisheries power.

The Constitutional Commission's Advisory Committee on the Distribution of Powers considered whether the Commonwealth should increase its responsibilities for fisheries. In its report to the Constitutional Commission the advisory Committee found "[n]o dissatisfaction was expressed [from the Commonwealth or the States] in regard to the operation of the OCS."<sup>35</sup> While an attempt to broaden

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<sup>32</sup> See particularly the High Court's deliberations in the *Bonser* and *Raptis* cases. Lindell, in particular, has criticised the line of reasoning in *Bonser* in terms of the construction of the fisheries power.

<sup>33</sup> L. Zines, *The High Court and the Constitution* 2nd ed. (Sydney: Butterworths, 1987):22.

<sup>34</sup> *Ibid.* See also J. Waugh, *Australian Fisheries Law*, Special Projects Series 1, the Offshore Areas, Intergovernmental Relations in Victoria Program (Melbourne: Melbourne University Law School, 1988).

the reach of the Commonwealth fisheries power is unlikely at present it could occur if the Commonwealth felt that the States were acting outside the national interest.<sup>36</sup> Such action would be highly contentious.

In addition to the fisheries power (Section 51 x) the Commonwealth's constitutional powers over the offshore have been supported by the external affairs power (Section 51 xxix). As the international law of the sea has developed the external affairs power has assumed considerable significance in reinforcing Commonwealth jurisdiction offshore. It was the external affairs power which was used as the anchor for the Commonwealth's *Seas and Submerged Lands Act 1973*. The High Court's decision in the States' challenge to this legislation (the *Seas and Submerged Lands* case) was an important reinforcement of the external affairs power.

### **Intergovernmental Interaction and The Emergence of Commonwealth Interest in Fisheries**

It was not until the early 1950s that the Commonwealth enacted legislation under the fisheries power of the constitution, although legislation concerned with whaling and regulating pollution of the marine environment was enacted in the 1930s.<sup>37</sup> Following federation the States maintained regulatory and administrative responsibilities for fisheries under diverse legislative and administrative arrangements. A

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<sup>35</sup> Australia, Constitutional Commission Advisory Committee on the Distribution of Powers, *Report of the Advisory Committee on the Distribution of Powers*, (Canberra: AGPS, 1987):185.

<sup>36</sup> G. Lindell, pers. comm. 7 December 1989.

<sup>37</sup> *Beaches, Fishing Grounds and Sea Routes Protection Act 1932; Whaling Act 1935*.

conference between the Commonwealth and the States convened in 1907 reflected an early Commonwealth interest in the development of the Australian fisheries with "resolutions at this conference related to the scientific investigation and development of fisheries as Commonwealth responsibility".<sup>38</sup> Following this conference H. V. Dannevig was appointed Commonwealth Director of Fisheries and a research vessel was commissioned.

The loss of this fisheries research vessel (the *Endeavour*) "with all hands" (including Dannevig) in the Southern Ocean in 1914, together with the pressures from World War I, contributed to a waning Commonwealth interest in direct involvement in fisheries management.<sup>39</sup> After the war there were several attempts to rekindle this interest. Following a Royal Commission on Victorian Fisheries and Fisheries Industries in 1919 the Premier of Victoria corresponded with Prime Minister Hughes, urging discussions with the Commonwealth, although little action followed. Increased interest in the potential of Australia's fishery resources led Prime Minister Bruce to convene a national fisheries conference which met in Melbourne in September 1927.<sup>40</sup> A second meeting of this conference was held in Sydney in 1929.

The emphasis of these conferences was on the development of unexploited stocks, and the Commonwealth was encouraged to set up an organisation to aid this development. The depression meant that

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<sup>38</sup> Commonwealth Parliamentary Debates, (House of Representatives) 28/2/1952: 565.

<sup>39</sup> Ibid.

<sup>40</sup> Australian Archives, CP 327/5.

this proposal lapsed, and with the outbreak of the Second World War attention focussed elsewhere. In the mid 1940s further conferences were held between the Commonwealth and the States on fisheries development in the post-war period. These meetings foreshadowed increased Commonwealth involvement in fisheries linked to post-war reconstruction with discussion focused on the establishment of a Commonwealth fisheries authority.

A conference between the Commonwealth and State representatives in August 1945 reached agreement to establish such an authority, and in the following year it was located within the Commonwealth Department of Commerce and Agriculture,<sup>41</sup> to "undertak[e] a programme of management and development in the fishing industry."<sup>42</sup> The Commonwealth Minister responsible for the fisheries authority was later to claim (in the second reading of the *Fisheries Bill* 1952) that "it had long been apparent that such a programme was required but it could not be effectively implemented without legislation."<sup>43</sup>

The proposal to develop Commonwealth fisheries legislation had been discussed between Commonwealth and State fisheries officers in February 1947, resulting in agreement "that steps should be taken by the Commonwealth to enact legislation to cover fisheries beyond the three mile limit."<sup>44</sup> According to Harrison, the division of responsibilities

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<sup>41</sup> Commonwealth Parliamentary Debates, (House of Representatives) 28/2/1952, 565. See also Australian Archives A432/1946/1412.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid. See also Australian Archives A432/1 68/3399, PT 1.

agreed at this meeting was very similar to the agreement over the fisheries component of the Offshore Constitutional Settlement reached in 1979.<sup>45</sup> The fisheries officers agreed that a second meeting would be held following the enactment of this legislation. Draft legislation was prepared in 1948 but was delayed as "the whole question of the competence of States to enact fisheries legislation became the subject of international discussion."<sup>46</sup> One factor contributing to this delay "was a request from the United Kingdom Government to withhold action pending a decision of the International Court in the British - Norwegian [North Sea] dispute."<sup>47</sup>

Intergovernmental interaction over fisheries heightened in the 1950s in response to two emergent and related issues. The first issue centred on the growing international interest in high sea resources which led to the North Sea dispute. The second issue, and one which was of more immediate influence, were claims that existing State fisheries laws were failing to combat "lawlessness" among fishermen who were beginning to exploit deep sea trawl grounds off the east coast of Australia. Some doubt was expressed in State parliaments and in the press over the competence of State fisheries legislation, viewed as being restricted to within the "three mile limit". Commonwealth legislation would provide regulation of these new fisheries, and resolve the problem that Barton had foreshadowed during the federation debates. Obviously the expansion of Commonwealth powers to deal with domestic issues

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<sup>45</sup> A. J. Harrison. "Marine living Resources Policy in Tasmania", in R. A. Herr, R. Hall and B.W Davis, (eds.) *Issues in Australia's marine and Antarctic Policies*, Public Policy Monograph, Department of Political Science, University of Tasmania (1982): 81.

<sup>46</sup> Commonwealth Parliamentary Debates, (House of Representatives) 28/2/1952, 565. See also Australian Archives A432/1 68/3399, PT 1.

<sup>47</sup> Australian Archives A432/1 68/3399, PT 1.



would also enhance the need for strong national claims over the resources of the territorial sea and adjacent continental shelf. It was these imperatives which encouraged the Commonwealth to enact fisheries legislation.

### **The Australian Fisheries Act**

McEwen, as Minister for Commerce and Agriculture introduced the Commonwealth's Fisheries Bill which received bi-partisan support in the House of Representatives. McEwen emphasised:

that the government has no thought of encroaching in any way upon the sovereign rights of the States in their own areas. In implementation of a total pattern of fisheries practice and conservation, the Commonwealth legislation makes provision under which the administration of laws, both State and Commonwealth, in the waters contiguous to the States, could be supervised by State officials, to the degree necessary, under power delegated by the Commonwealth.<sup>48</sup>

After a relatively quick passage through the House of Representatives, the Fisheries Bill reached the Senate on the 5th March 1952. The Bill's reception in the Senate was in marked contrast with the debate in the House; the legislation was subjected to close examination by a number of Senators. Senator Cormack, (Victoria, Liberal) prefacing his remarks with the observation that "[t]his chamber is the Senate of the Parliament of the Commonwealth, and is charged specifically with the defence of the rights of the States", observed "that the Commonwealth has no authority to delegate that [fisheries] power to the States, although the States may refer power to the Commonwealth in this matter."<sup>49</sup>

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<sup>48</sup> Commonwealth Parliamentary Debates, (House of Representatives) 28/2/1952, 564-565.

<sup>49</sup> Commonwealth Parliamentary Debates, (Senate) 5/3/52 841.

Senator McKenna, Opposition Senate Leader, referred to the generally accepted view on State powers and implied that Australia could avoid the current controversy being experienced in the United States over offshore jurisdiction.

Very fortunately, in this country the constitutional position between the States and the Commonwealth is as clearly defined as it could be. *There is no argument that the States enjoy control over their territorial waters which are generally recognised as being within three miles of the shore.* There is no strictly fixed rule about that limit.<sup>50</sup>

Although believing that the constitutional position was clearly defined McKenna pre-empted a controversy which was to continue well into the following two decades when he

point[ed] out that the words 'territorial limits' are not clearly defined. It is not known with certainty where the State's jurisdiction ends and that of the Commonwealth begins.<sup>51</sup>

The Opposition highlighted the importance of resolving conflicts between Commonwealth and State powers so that "one authority will actively operate over the . . . territorial waters and those beyond."<sup>52</sup> McKenna saw this as a solution to duplication in the administration of Australian fisheries but also a way of avoiding the difficult issue of "determining lines of demarcation between State and Commonwealth authorities".<sup>53</sup> It was not until the late 1960s, however, with additional

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<sup>50</sup> Ibid. 838. Emphasis added.

<sup>51</sup> Ibid. 840

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

stresses brought on by the management of other marine resources, that the practical issue of the boundary of State and Commonwealth legislation was to be raised again. While the *Fisheries Act 1952* gained assent following its passage through the Senate it was not proclaimed until 1955. The interregnum was due to the need to consult the States on the impact of this legislation on their operations.

### Establishing Intergovernmental Arrangements

The need to formalise arrangements facilitating co-operation between the Commonwealth and States over fisheries was discussed at a Premiers' Conference in January 1946. A resolution from this conference agreed "that officers of the State and Commonwealth confer on the subject and report to the next conference of Commonwealth and State Ministers".<sup>54</sup> Prime Minister Chifley invited each of the State Premiers to consider mechanisms to enable consultation between Commonwealth and State Ministers and officials. The Prime Minister suggested "that the Australian Agriculture Council be the medium for exchanging views and for the development of a common policy."<sup>55</sup> Chifley also suggested that heads of Fisheries Departments might meet either with the Standing Committee on Agriculture or *in a separate conference*. The response of the State Premiers indicated the desire to establish ministerial contact over fisheries although some States (New South Wales, Tasmania and Western Australia) doubted that the Australian Agricultural Council was the "appropriate body".<sup>56</sup> It was to take another twenty-two years before a separate ministerial council for fisheries was established.

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<sup>54</sup> Australian Archives A609 105/14/3.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

The first meeting of the Australian Fisheries Council (AFC), the ministerial council representing Commonwealth and State Ministers responsible for fisheries only took place in 1968, although there was agreement to establish the AFC after a conference of State and Commonwealth Ministers in 1960. State and Commonwealth officials had supported the creation of this council in 1958. Although Commonwealth had introduced its fisheries legislation fifteen years earlier, and the States had argued for a ministerial council and a more structured arrangement for meetings of officials from the late 1940s, the establishment of a specific intergovernmental council did not take place until increased pressures on the fishing industry enhanced the need for Commonwealth - State collaboration.<sup>57</sup> As Leach notes

[re]presentatives of State fisheries departments had been coming together from time to time for some years, and in 1955, since fisheries had assumed an important place in the Australian economy they began to meet annually. They decided very quickly, however, that they could not get very far alone because every question involving policy matters had to be referred back to the Ministers in several states and sometimes to the Commonwealth government in Canberra as well. <sup>58</sup>

Leach took the view that "[w]ithin a few years the fisheries group will probably be making as significant a contribution to interstate cooperation in its area of concern as the Agricultural Council has been making in its own for over a quarter of a century."<sup>59</sup> The delay in the

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<sup>57</sup> As discussed in the previous chapter this period coincided with the establishment of numerous intergovernmental linkages. See also R.J.K. Chapman, "Intergovernmental Forums and the Policy Process" in B. Galligan, (ed.) *Comparative State Policies* (Melbourne: Longman Cheshire, 1988): 99-121.

<sup>58</sup> R. H. Leach, *Interstate Relations in Australia*, (Lexington: University of Kentucky Press, 1965): 54.

<sup>59</sup> *Ibid.* 55.

"launching" of the AFC is indicative of the the complications arising from intergovernmental interaction in this area. Following the meeting of Ministers responsible for fisheries in 1961 the Commonwealth Minister for Primary industry referred the matter of a separate fisheries council to the Commonwealth government "but it was decided that this somewhat elaborate machinery [of Ministerial Council and Standing Committee] was not necessary at that time".<sup>60</sup>

Pressure to alter the ad-hoc relationship between the Commonwealth and the States increased from stresses incurred on fisheries managers as the result of a period of rapid development in the Australian fishing industry. The value of production increased over 30 percent between 1961 and 1965-66 - from \$31 712 000 to \$41 794 000 in 1968 dollar values. Similar pressures for a further re-vamping of Commonwealth - State arrangements in fisheries occurred during a period of fairly rapid change in orientation of Australian fisheries in the late 1970s. In this latter period the imperatives associated with the declaration of an extended 200 mile Australian Fishing Zone (AFZ) in November 1979 became entangled with discussion over the OCS.

The AFC and its Standing and Technical committees were to provide important forums for intergovernmental interaction in the 1970s and 1980s, including much discussion on the implementation of the fisheries package of the OCS. It was at an AFC meeting in 1986, for example, that the Commonwealth announced that the fisheries component of the OCS would finally be implemented. By the early

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<sup>60</sup> *Minutes of the First Meeting of the Australian Fisheries Council and Standing Committee on Fisheries* Agenda item 3.1, (Canberra: Department of Primary Industry, May 1969).

1990s the AFC had served an important function in facilitating the implementation of the OCS arrangements. Like most ministerial councils working on a consensus based decision making, the AFC has its limitations although it also encourages a flexible approach; New South Wales has stood outside the OCS arrangements although it has retained an active involvement in the AFC.

As the Commonwealth became more active in direct fisheries management through licensing fishermen and fishing vessels, it was drawn into greater conflicts with the States. At the same time the Commonwealth was attracting a range of clients; - fishermen who looked to the Commonwealth for licences, or as a higher authority in the innumerable conflicts within the fishing industry. Becoming involved in day to day fisheries management activities meant that the Commonwealth developed close links with fishermen and fishing industry organisations as well as with State authorities. An important adjunct to the establishment of the AFC, described by Herr and Davis as the "major landmark prior to the OCS",<sup>61</sup> was the creation of the Australian Fishing Industry Council (AFIC), a national industry organisation. The need for AFIC reflected a practical issue raised by the increased involvement of the Commonwealth, the need to provide mechanisms for consultations with resource user groups. Herr and Davis argue that it was not surprising that AFIC as a new industry body took on a national character, as this paralleled the establishment of the AFC. However, they comment that "what was somewhat unusual was that the Commonwealth's Department of Primary Industry took deliberate steps to foster the growth of the national industry body, in

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<sup>61</sup> R. A. Herr and B. W. Davis, "The Impact of UNCLOS III on Australian Federalism", *International Journal*, XLI (Summer 1986): 684.

part to help legitimise the growing use of Commonwealth fisheries powers."<sup>62</sup>

The important nexus created between government and industry concerning fisheries policy in the late 1960s was to continue into the 1990s. The institutionalisation of industry organisations into the policy process was enhanced in the 1980s as a result of a major conference called by the Australian Fisheries Service in January 1985. This strategy had the strong support of the Commonwealth Minister for Primary Industry and was seen as a way of improving relations between industry and the Commonwealth government. Prior to this conference, which saw AFIC replaced by the National Fishing Industry Council (NFIC) and the Fishing Industry Policy Council of Australia (FIPCA), AFIC had provided the Commonwealth with a further vehicle by which it could increase its influence in fisheries policy. AFIC also benefited from the close relationship with the Commonwealth fisheries agency and this was reflected in the view that "[t]he fragile local associations of rather parochial fishermen were given encouragement in the late 1960s to spread their wings and join the respective State branches of the Australian Fishing Industry Council."<sup>63</sup>

In some States, notably Western Australia and South Australia, the AFIC organisation became influential, but in others (such as Tasmania or Victoria) AFIC did not displace the traditional industry organisations. In these States it was used as an alternative organisation by fishermen disaffected by decisions or lack of action by traditional industry groups. AFIC's influence at the State level therefore waxed and waned as a

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<sup>62</sup> Ibid.

<sup>63</sup> J. Cole, "Relationships with Industry and Government", Paper Presented to the Australian Fisheries Conference, (Canberra: January 1985).

result of the internecine political battles between fishermen and the tendency for the industry to fragment into smaller groups as a result of these internal conflicts. At the national level, however, the establishment of the AFIC can be seen as an attempt by the Commonwealth to enhance its claims to have a legitimate role as a fisheries manager, administrator or regulator, and its participation in the Australian Fisheries Council.

The relationship between industry groups and different tiers of government in a federal system provides an important, yet neglected, aspect of intergovernmental interaction. The linkages between industry groups and government departments provide reinforcement of that tier of government's interest in the particular policy area. Client groups will be attracted to develop close relationships with their patrons, but this will not preclude them from using the opportunities provided by the federal system to "appeal to a higher authority". The presence of these groups adds a third party dimension to intergovernmental arrangements whose influence is generally understated in the literature.<sup>64</sup>

The Commonwealth's increased influence, and the number of "client groups" it had attracted, was viewed with some concern and suspicion by State governments. This wariness ensured that uneasy collaboration rather than harmony characterised Australian fisheries policy making. The establishment of the relatively strong links through the AFC and its Standing Committee - examples of Warhurst's rods of iron -

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<sup>64</sup> But see N. Bankes, *Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia* *Alberta law review*, XXIX, 4 (1991): 792-838.



occurred just before the question of offshore jurisdiction was raised again. With most interest centred on oil and gas, issues specifically related to fisheries tended to be removed from centre stage and yet still had important influence.

Technological developments in offshore oil and gas drilling continued to proceed, leading to increased interest in sedimentary basins in offshore areas. Drilling from self supporting platforms in shallow bays and inlets had been undertaken since the 1930s, but by the end of the Second World War that technology was developing to enable drilling in deeper water, further offshore. Given the potential of offshore sedimentary basins President Truman acted to declare sovereignty over these resources of the continental shelf. The Truman Proclamation "declared that the natural resources of the submerged lands beneath the sea bordering the coastline of the United States were to be under its exclusive jurisdiction and control".<sup>65</sup> Australia followed the lead of the United States by making a similar declaration to the Truman Proclamation in 1953, asserting control over activities exploiting the sea bed and sub-sea areas of the Australian continental shelf.<sup>66</sup> Australia proclaimed on the 11th September 1953 that it held "sovereign rights over the sea bed and subsoil of the continental shelf contiguous to the coasts of Australia and its Territories for the purpose of exploring and exploiting the natural resources of that sea-bed and subsoil."<sup>67</sup>

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<sup>65</sup> J. D. Dennis, "Territorial Waters-Ownership and Control", *Case Western Reserve Journal of International Law*, 8, (1976): 244.

<sup>66</sup> R. D. Lumb, "The Law of the Sea and Australia's Future Maritime Policy" *Pacific Community*, 6 (Spring 1970): 64-72.

<sup>67</sup> *Commonwealth Statutory Rules 1901-1956*, V, 5350 quoted by C. W. Harders, "The Sea-Bed", *Federal Law Review*, 3, (1969): 202.

### International Treaties

The Truman Proclamation (and similar actions by other coastal states such as Australia) encouraged the international community to consider the implications of such practices. Moves to establish a conference on the law of the sea gained momentum during the 1950s with the first United Nations Conference on the Law of the Sea (UNCLOS I) concluding in Geneva in 1958. Unlike an earlier conference in 1930, sponsored by the League of Nations, which produced draft texts on the territorial sea and contiguous zone which did not gain ratification,<sup>68</sup> this conference produced agreement on four conventions which were progressively ratified and entered force in the 1960s. The United Nations Conference on the Law of the Sea concluded in 1958, with the four conventions open for ratification. Australia ratified the Convention on the Continental shelf in 1963, with the convention needing twenty-two instruments of ratification to be lodged before it could enter force. The twenty-second state to ratify the convention (the United Kingdom) did so in April 1964 during, coincidentally, a major conference between the Commonwealth and the States on the issue of offshore jurisdiction and royalties. The Convention on the Continental Shelf entered force in 1965 and was to become a major influence on Australian policy and intergovernmental relations offshore.

Australia was instrumental in gaining the inclusion of "living resources" in the conventions which emerged from the first United Nations Conference on the Law of the Sea (UNCLOS I).<sup>69</sup> Although

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<sup>68</sup> T.T.B. Koh, and S. Jakakumar, "The Negotiation Process of the Third United Nations Conference on the law of the Sea" in M. H. Nordquist, (ed.) *United Nations Convention on the Law of the Sea 1982: A Commentary* Vol. 1 (Dordrecht: Martinus Nijhoff, 1985): 30.

<sup>69</sup> C. W. Harders, "The Sea-Bed", 202.

issues such as the extent of, and fishing rights within, the territorial sea were not resolved during UNCLOS I it was clear that, as a result of increased interest in marine resources, continued development of distant water fisheries would impact on coastal states such as Australia. The removal of the last of the "Macarthur lines" limiting the area of operation of the Japanese distant water fishing fleet in 1952 was an important influence on Australian decision making. The declaration of sovereignty over the continental shelf, the concern with including living resources in the United Nations law of the sea agenda and the passage of the *Australian Fisheries Act 1952* all occurred soon after the restrictions on the Japanese fishing industry were lifted.

The development of customary international law of the sea following UNCLOS I and the inconclusive Second Law of the Sea Conference (UNCLOS II), provide an important adjunct to attempts by the Commonwealth to assert jurisdiction over Australian coastal waters in the late 1960s and early 1970s. The nexus between developments in the international law of the sea and Australian domestic policy making was to continue to influence intergovernmental relations throughout the 1960s and 1970s. The period during which intense intergovernmental negotiations took place over the OCS occurred while the Third United Nations Conference on the Law of the Sea (UNCLOS III) was meeting between 1974 and 1982. It is telling that while Australian domestic conflicts over offshore jurisdiction played no real part in Australia's position at UNCLOS III meetings, with the exception that a "States Advisor" was included in the delegations to the latter sessions of the conference, the States were well aware of the implications of the

developments in the international law of the sea in terms of domestic political and policy outcomes.

Although UNCLOS II collapsed, Australia followed Britain, Canada the United States of America and New Zealand in extending its fishing zone to twelve miles.<sup>70</sup> Australia extended its fishing zone to twelve miles in 1967. As Hardman indicates "no change was made in the three mile width of the territorial sea of the individual States and Territories".<sup>71</sup> A consensus that the States controlled fisheries activities in the territorial sea was to be shattered in the late 1960s. The way that existing arrangements were challenged is as interesting as the outcome which gave the Commonwealth the opportunity to reconsider the intergovernmental arrangements which had emerged in the decade and a half after the proclamation of the *Australian Fisheries Act* in 1955.

Given the uncertain status of jurisdiction offshore the High Court was eventually to become involved in adjudicating competing claims. The determination of, or the resolution of disputes over, the boundaries of offshore jurisdiction was seen by O'Connell as being linked to broader questions. He commented that "the way a court will approach the problem of maritime boundary will in the last resort depend upon its attitude to federalism as a theory and as a system of government."<sup>72</sup>

### Judicial Review

In 1969 the High Court brought down a decision in *Bonser v. La*

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<sup>70</sup> D. J. Hardman, "Commonwealth-State Relationships in the Australian Fishing Industry", *Public Administration*, XXVII, 2/3 (June -September 1969): 217.

<sup>71</sup> Ibid.

<sup>72</sup> D. P. O'Connell, "Australian Coastal Jurisdiction", 291.

*Macchia*<sup>73</sup> which was to provide an important stage in judicial review of contending Commonwealth - State claims over the offshore, and an important element prior to the eventual *Seas and Submerged Lands* case of 1975. *Bonser v. La Macchia* involved a prosecution for a breach of fisheries regulations issued under the *Australian Fisheries Act 1952*. The defendant

challenged the constitutional validity of the Proclamation [of scheduled waters under which regulations could be made] firstly on the grounds that the constitutional power of the Commonwealth with respect to fisheries is limited to fisheries in waters within three nautical miles of the Australian coast. Implicitly this contained the argument that the States end at the low water mark.<sup>74</sup>

As it turned out the High Court read the fisheries power to mean that Commonwealth legislation was valid and dismissed the challenge. The interest in *Bonser* arises, however, less from the decision of the court but in the individual judgements in the case. O'Connell noted that "of the five justices who delivered judgements in *Bonser v. La Macchia* only two went into the question of State boundaries and that they, Barwick (C.J.) and Windeyer (J.) held that *R v. Keyn* had determined that the colonial boundaries lay at the low water mark."<sup>75</sup> O'Connell emphasised that Barwick and Windeyer had considered that nothing that had happened since had altered this position.

*Bonser's* case caused a flurry of intergovernmental consultation as a result of the unexpected comments of Barwick and Windeyer. Most

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<sup>73</sup> *Bonser v. La Macchia* (1969) 43 A.L.J.R

<sup>74</sup> D. P. O'Connell, "The Commonwealth Fisheries Power and *Bonser v. La Macchia*", *Adelaide Law Review*, 3, 4 (August 1970): 500.

<sup>75</sup> *Ibid.* 504.

State officials and legal officers had expected the Court to uphold the Commonwealth's legislation as the case raised the very situation that the Commonwealth had used to argue for the *Fisheries Act* in the early 1950s. The State fisheries and law officers had expected the case to be decided simply on the validity of the Commonwealth Act, not to involve, however laterally, the question of the boundary of State jurisdiction.<sup>76</sup> As a result of this unexpected intervention in Commonwealth - State arrangements, *Bonser's* case was discussed at the second meeting of the Standing Committee on Fisheries where a paper on the High Court's decision was tabled by the Commonwealth. The Commonwealth officials tended to down play the impact of *Bonser's* case. They "pointed out that no case had been argued and no decision had been handed down relating specifically to the inner boundaries of Proclaimed Waters and it should be remembered that the chief justice and one justice had expressed opinions in this regard."<sup>77</sup> State fisheries officers were less sanguine, some foreshadowing further challenges to the Commonwealth Fisheries Act within two years.

*Bonser v. La Macchia* did raise important, and broader issues. In raising the question of the boundaries of the States, Barwick and Windeyer indirectly provided a trigger for the expansion of Commonwealth claims offshore. Not only did *Bonser* provide the Gorton government with support (admittedly in a tangential manner) for legislation attempting to declare Commonwealth jurisdiction from low water mark, but it reopened questions which were finally to be answered by the High Court in the *Seas and Submerged Lands* case.

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<sup>76</sup> R. Jennings, pers. comm. October 1989.

<sup>77</sup> *Minutes of the Second Meeting of the Standing Committee on Fisheries*, (Hobart, February 1970): 27.

*Bonser* illustrates how the High Court can have an influence in setting the boundaries for further intergovernmental interaction rather than resolving jurisdictional disputes. The case also shows how the intergovernmental agenda can be influenced by specific elements of judgements, rather than the court's formal decision. Thus this case is also useful in reinforcing the point that outcomes of such judicial decisions may be more complex, and in many cases more important, than a literal black letter interpretation would allow.

Of more direct concern for the States was the increased uncertainty over offshore jurisdiction between the Commonwealth and States. The early 1960s saw attempts to reduce this uncertainty in the face of rapid development of oil and gas exploration in Bass Strait. The discovery of commercial quantities of both oil and gas in early "wild-cat" drilling led to lengthy negotiations between the Commonwealth and the States which concluded with the introduction of an intergovernmental agreement governing offshore oil and gas exploration and production. The development of, and reaction to, what became known as the 1967 Petroleum Agreement is discussed in the following Chapter.

## Chapter Three

### Intergovernmental Agreements and Offshore Oil and Gas:

#### The 1967 Petroleum Agreement

In an attempt to encourage exploration for oil and gas, following discoveries of oil in far north-western Western Australia in the 1950s, the Commonwealth established a subsidy for oil and gas search. This subsidy encouraged large-scale exploration and saw seismic surveys being introduced to assess the relative prospectivity of broad areas. Although most of these surveys were concentrated on-shore, consultants to Broken Hill Proprietary (BHP) - Australia's largest mining and manufacturing company - encouraged it to fund seismic work offshore in the Gippsland Basin in Bass Strait.<sup>1</sup>

The discovery of extensive hydrocarbons reserves in Bass Strait in the mid 1960s was particularly influential in sharpening the Commonwealth's interest in the question of offshore jurisdiction<sup>2</sup>

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<sup>1</sup> BHP hired Lewis Weeks, who had worked for Standard Oil in the USA, as a consultant to oversee their interests in the oil search. Weeks reportedly told the BHP directors that their on-shore search had little likelihood of success, and if they were serious they should be "prepared to get their feet wet". See A. Trengove, *What's Good for Australia ...: The Story of BHP*, (Stanmore: Cassell Australia, 1975) and R. Wilkinson, *A Thirst for Burning: The Story Of Australia's Oil Industry*, (Sydney: David Ell Press, 1983).

<sup>2</sup> R. Cullen, *Australian Federalism Offshore*, Intergovernmental Relations in



although it lacked sufficient legislative power to influence the allocation of the first offshore exploration permits. In the absence of relevant Commonwealth legislation the original tenements for the Bass Strait region were granted by the South Australian, Tasmanian and Victorian governments.<sup>3</sup> The potential economic return from offshore oil and gas also attracted the interest of the State governments. The uncertainty of the constitutional position, particularly following the American experience and the discoveries in Bass Strait, encouraged the Commonwealth and State governments to establish an administrative framework which would facilitate and encourage the exploration of, and production from, offshore leases.

A determined attempt was made by both the Commonwealth and the States not to pre-empt a constitutional challenge over offshore jurisdiction. As a dispute over jurisdiction may have disrupted the emerging exploration programme, negotiations began in 1962 over such a framework. These negotiations concluded with the implementation of what became known as the "Petroleum Agreement" in 1967. The extensive round of intergovernmental interaction leading to the 1967 Agreement was greatly influenced by two, related, factors. The first, and most immediate, was the effect of the unresolved issue of constitutional power in the territorial sea and the second was the ratification, and

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Victoria Programme, (Melbourne: University of Melbourne Law School, 1985).

<sup>3</sup> C. H. Leigh, "Oil and Natural Gas Developments in the Bass Strait Area, Australia", *Geography*, 55, (1970): 221-223. Interestingly the original tenement granted to the ESSO-BHP joint venturers, prior to later revocation of areas in the Otway and Bass basins, comprised 64,000 square miles (158,000 km<sup>2</sup>)-the total area of Bass Strait. An indication of the fact that the resource developments had outstripped legislative change is that only Victoria had a specific "undersea resources" legislation; M. Haward, "The Australian Offshore Constitutional Settlement", *Marine Policy*, 13, 4, (October 1989): 334-348.

entering into force, of the United Nations Convention on the Continental Shelf.

In early 1962 Sir Garfield Barwick, then Commonwealth Attorney - General, prepared an opinion acknowledging the rights of the States in the territorial sea. The States saw the issue of constitutional powers as important and prepared to raise the issue at a meeting of the Standing Committee of Attorneys-General (SCAG) later in the year. In March 1963, following the meeting of SCAG, the Commonwealth parliamentary draftsman forwarded material to Barwick regarding the question of jurisdiction. The Victorian and Queensland State governments corresponded with the Commonwealth Attorney - General, and reiterated their claims over the offshore areas. An opinion prepared by A.L. Bennett Q.C. for the Queensland government was forwarded to Barwick who in turn passed it to the Victorian Attorney-General. The Bennett opinion proposed using Section 51 (xxxviii) of the Australian constitution as a means of retaining State power<sup>4</sup> in the event of a challenge to State jurisdiction - a measure to be resurrected fifteen years later and underpin the OCS through the *Coastal Waters (State Powers) Act 1980* (Cwth).

Following the exchange of legal opinion, there was greater impetus toward an agreement between the Commonwealth and the States over arrangements for the administration of offshore oil and gas. A Commonwealth and State conference was scheduled for mid April 1964 to discuss these matters. This meeting, convened by the New South Wales Minister for Mines between the 16th and 17th April 1964, involved the State Ministers for Mines, with legal and technical

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<sup>4</sup> Archives Office of Tasmania Solicitor-General's Department, SGD 40, 1 (1435/6).

advisors (including State Solicitors-General) present. The first day of the conference saw the States exchanging information and attempting to establish a consensus position prior to meeting with Commonwealth ministers. On the 17th of April the conference met with the Commonwealth Minister for national development (Sir William Spooner) and the newly appointed Commonwealth Attorney-General (Mr Billie Snedden).

The State Ministers and officials discussed the issues of jurisdiction in the territorial sea and over the continental shelf. Sir Henry Winneke (the Victorian Solicitor-General) pointed out existing Commonwealth powers and drew attention to the importance of the treatment of inconsistency between Commonwealth and State laws and raised the issues of the nexus with the "peace order and good government" clauses of State constitutions.<sup>5</sup> The delegates discussed the problems of a lack of clearly defined property rights in the continental shelf, and the complex situation regarding royalties which could be legally seen as "a duty of customs and excise". The issue of excise was to surface again in the 1970s and 1980s, initially as the means by which the Commonwealth was able to increase its share of oil and gas revenues which triggered, a few years later, an attempt by Victoria to circumvent the effects of this distortion to the pattern of revenue sharing. The question of the sharing of oil and gas royalties was one of the major concerns of the meeting in April 1964, and is one of the few times where this issue was discussed in two and half decades of intergovernmental negotiation over offshore oil and gas.

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<sup>5</sup> Memo from D.M. Chambers to Attorney General 21/4/64 Archives Office of Tasmania Solicitor-General Department files: SGD 40,1 (1435/6).

The States had originally argued that since they claimed jurisdiction over offshore minerals and petroleum they were entitled to all the royalties, in the same manner that onshore mining was conducted. One delegate informed the rest of the meeting that "he had heard unofficially that day . . . that the Commonwealth would be suggesting that royalties were to be shared on an equal basis".<sup>6</sup> The State Ministers and officials agreed that, the royalty question apart, some Commonwealth legislation was necessary to give security of title to offshore explorers. This response reflects the obvious fear that proposed drilling programmes in Bass Strait would be forestalled if this security could not be guaranteed. The royalty issue was less easily settled. The Tasmanian Solicitor-General "suggested that . . . the states ought to prepare themselves by considering what weapons, if any that they held when it came to a matter of hard bargaining."<sup>7</sup> The conference adjourned until the following day to meet the Commonwealth representatives.

Sir William Spooner, the Commonwealth Minister for National Development, informed the States that the issue of offshore mining had been to federal cabinet and that the Commonwealth proposed that an agreement with the States would be an appropriate instrument to resolve the matter. He said the Commonwealth's proposals "were motivated by a desire to promote certainty and celerity and to avoid litigation".<sup>8</sup> The Commonwealth's position shifted somewhat. An exchange between Spooner and Mr Rylah (the Victorian Attorney-

<sup>6</sup> The source of the information is not identified in the Chambers memo. Archives Office of Tasmania SGD 40,1 (1435/6).

<sup>7</sup> Chambers memo, Archives Office of Tasmania SGD 40,1 (1435/6).

<sup>8</sup> Ibid.

General) intimated that Sir Garfield Barwick had modified his opinion over the extent to which the States held rights in the territorial sea.<sup>9</sup>

The form of the proposed intergovernmental agreement was discussed at this meeting. The consensus was that the administration of any legislation should be undertaken by the States, with royalties from production shared between the States and the Commonwealth. South Australia criticised the Commonwealth proposals with Sir Lyell McEwan asking "legalities aside, where was the business justification for the Commonwealth claiming half the royalties when the states would be doing all the administration?"<sup>10</sup> This argument, supported by the Victorian delegates Rylah and Winneke,<sup>11</sup> was to continue to be the major point of dispute in negotiations over the next two and a half years.

As a result of the States' opposition to the revenue sharing proposal, a revision of the Commonwealth's proposals was prepared and submitted to the State delegates in the afternoon of the 17th April 1964. A draft intergovernmental agreement over offshore mining and petroleum issues was also discussed, although criticised by Winneke as "attempting to legislate the States out of the territorial sea." A report of the meeting published by the Age:

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<sup>9</sup> Sir Garfield Barwick, a former Liberal-Country Party coalition Attorney-General and Minister for External Affairs was appointed to the High Court in 1964 amidst some controversy over his handling of the external affairs portfolio. See B. Galligan, *The Politics of the High Court* (St. Lucia: University of Queensland Press, 1987): 194.

<sup>10</sup> Chambers memo, Archives Office of Tasmania SGD 40,1 (1435/6)

<sup>11</sup> As an aside, both Ryah and Winnecke continued to play important roles in the ongoing discussions over the offshore. In the mid to late 1970s each was involved in the early negotiations over the OCS.

recognized that the Commonwealth and the States had conflicting constitutional claims to the offshore sea-bed and were anxious to avoid any action that would induce litigation. . . . A royalty of 10 per cent of value at well head would apply, with royalties to be shared on an agreed reasonable basis.<sup>12</sup>

Although failing to gain agreement over the form of the intergovernmental arrangement, or over the contentious issue of revenue sharing related to the mode of royalty payments, the April 1964 meeting was, none the less, significant. The Tasmanian Solicitor-General informed his Attorney-General (Mr Roy Fagan) that "no formal agreement has yet been reached between the States and the Commonwealth but all the States felt after the conference was concluded that a satisfactory arrangement with the Commonwealth was possible."<sup>13</sup>

The process to establish an intergovernmental agreement over offshore petroleum continued. The matter was raised at the Premiers' Conference of June 1965 which resulted in agreement that there should be a legislative base for the arrangement. Following the Premiers' Conference it was expected that draft bills would be presented to the Commonwealth parliament in the budget session of 1965.<sup>14</sup> Statements regarding this legislation, giving the broad parameters of the Petroleum Agreement as well as the initial design of the arrangement, were presented to all State and the Commonwealth parliaments in November 1965.<sup>15</sup> Mr Fairbairn (Commonwealth Minister for National Development) released a Ministerial statement to the House

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<sup>12</sup> *Age* "Offshore Oil Search Code to be Drafted" 18 April 1964.

<sup>13</sup> Chambers memo, Archives Office of Tasmania SGD 40,1 (1435/6).

<sup>14</sup> *Australian* 2 August 1965.

<sup>15</sup> R. D. Lumb, "The Offshore Petroleum Agreement and Legislation", *Australian Law Journal*, 41, (February 1968): 453.

of Representatives on the 16th November 1965 in which he announced that "[t]he Governments of the Commonwealth and of the Australian States have reached agreement on a system of legislation to control and safeguard the exploration for and exploitation of the petroleum resources in Australian offshore areas."<sup>16</sup>

Fairbairn's statement indicates that one aim of the agreement was to give certainty to titles acquired by companies engaged in offshore oil search, and at the same time "enable constitutional issues to be put on one side, thus avoiding constitutional litigation of the kind that has been going on in the United States for many years."<sup>17</sup> The statement concluded by announcing that legislation embodying the agreement "would be brought down in the next Session of Parliament."<sup>18</sup> The Opposition's interest in the proposed scheme became apparent as Deputy - Opposition Leader Whitlam questioned the Minister over the position of territorial limits in the Gulf of Carpentaria, the Gulf of St. Vincent, Spencer Gulf and Bass Strait. The drawing of boundaries in the Gulf of St Vincent was to be considered in legal action in the High Court in the 1970s with argument in *Raptis'* case in 1977 central to this issue.<sup>19</sup>

Notwithstanding the desire of Fairbairn, and presumably the Commonwealth government, to introduce the necessary legislation in the first half of 1966, the proposed legislation implementing the Petroleum Agreement was subject to another round of meetings with

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<sup>16</sup> Commonwealth Parliamentary Debates, (House of Representatives) 16/11/1965, 2741.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> *Raptis, A and Son v South Australia* (1977) 51 A.L.J.R. 637.

the States in late 1966 and early 1967. These meetings concerned the final balance in the sharing of royalty payments, with consensus eventually reached enabling the 1967 Petroleum Agreement to be ratified by Commonwealth and the States. The Commonwealth accepted the States' view that they should have a majority share of the royalty revenue, moving from its original position of equal shares. Agreement with the States was hastened by the inclusion of a specific clause which stated that the agreement in no way derogated jurisdictional claims of either the Commonwealth or the States.

The 1967 agreement (see Appendix One) went to considerable lengths, however, to avoid raising these questions of sovereignty or jurisdiction.<sup>20</sup> Reid, with some justification, argues that it was an "agreement to postpone rather than to resolve the outstanding constitutional issues", describing the 1967 Agreement as a "substantial achievement" in co-operative federalism inspired by "pragmatic goodwill".<sup>21</sup> These elements, the basis of the negotiations between the Commonwealth and the States, were evident in the preamble to the agreement.<sup>22</sup> Reid has argued that that the Petroleum Agreement was

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<sup>20</sup> The full title of this arrangement was *An Agreement Relating to the Exploration of and Exploitation of the Petroleum Resources and Certain Other Resources of the Continental Shelf of Australia and Certain other Submerged Lands* (Canberra: Commonwealth Government Printing Office, 1967).

<sup>21</sup> P C Reid "Commonwealth-State Relations Offshore Mining and Petroleum Legislation; Recent Developments: An Historic Milestone or Millstone?" *Australian Mining and Petroleum Law Journal*, 2, 2 (1980): 60.

<sup>22</sup> The Preamble states "The Governments of the Commonwealth and the States have decided, in the national interest, that, without raising questions concerning, and without derogating from, their respective constitutional powers, they should co-operate for the purposes of ensuring the legal effectiveness of authorities to explore for, or exploit, the petroleum resources of those submerged lands". Quoted by Reid, "Commonwealth-State Relations Offshore Mining": 60.



"first a method of granting exploration and production titles which would be valid regardless of any limitations on the constitutional powers of the parties and, second, a uniform legal regime governing offshore petroleum operations."<sup>23</sup>

This regime was established by declaring what were to become known as "adjacent areas" offshore from each State. The States were to be responsible for the operation of the *Petroleum (Submerged Lands)* legislation in the adjacent areas. The mechanism ensuring uniformity within the regime involved establishing "mirror legislation", (identical Commonwealth and State legislation which applied equally to each adjacent area) to govern exploration and production operations. This legislation was designed so that:

[w]hile the Commonwealth legislation applied to all such adjacent areas, each State's legislation applied to the one area adjacent to its land boundaries. Thus two statutes, one Commonwealth and one State, applied to each adjacent area, and there could be no conflict provided the two pieces of legislation remained the same, and it was agreed that they would remain the same since amendments could only be made by unanimous consent.<sup>24</sup>

Harders claimed that "the legislative scheme [for the 1967 Petroleum Agreement] that all seven Australian Parliaments have adopted provides a most interesting illustration of federalism at work".<sup>25</sup> The lengthy period of negotiation over revenue sharing arrangements and the complex mechanics needed to implement the mirror legislation underpinning the agreement, indicate the efforts involved in developing and implementing the agreement. The Senate Select

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<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> C. W. Harders, "Australian Offshore Petroleum Legislation", 428

Committee on Offshore Petroleum Resources was to note that "the drafting of the provisions of the legislation was said to have taken 27 months and involved the preparation of about 100 drafts".<sup>26</sup> Much of this drafting was directed at designing legislation which would conform to the desire of all parties not to pre-empt a major constitutional dispute.

It seems clear that the desire to maintain the impetus of offshore oil exploration, particularly in Bass Strait, by providing security of title for the companies engaging in that search, provided a major impetus for completing the 1967 Agreement. Harders commented that although "it is not possible to exclude completely the possibility of a challenge being made to the constitutional validity of either the Commonwealth legislation or the legislation of the state . . . . [i]t is difficult to imagine circumstances in which a purpose would be served by taking a constitutional objection to the validity of one Act since the liability or obligation would remain under the other Act."<sup>27</sup> The device of mirror legislation was, in addition to any intergovernmental imperatives, thus able to satisfy the concerns of exploration companies for security of title.

There is considerable evidence to support the view that the driving force behind the 1967 Petroleum agreement was the desire by all governments to maintain the interest in offshore oil search. The agreement aimed to facilitate the allocation of exploration titles and production licences, following practice in the United Kingdom and the United States where support for exploration for offshore oil was seen as

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<sup>26</sup> *The Senate Select Committee on Offshore Petroleum Resources, (Interim Report (Canberra: Commonwealth Government Printing Office, September 1970): 94.*

<sup>27</sup> *Ibid.* 427.

a major element of policy.<sup>28</sup> The oil industry argued, and continued to maintain throughout the 1970s, that investment in the offshore was dependent on resolving the issues of jurisdiction.<sup>29</sup> In the 1980s the major dispute between government and industry over oil and gas policy centred on taxation regimes; indicative of later stages in policy development as the Commonwealth government attempted to increase returns from these developments.<sup>30</sup>

Esso Australia, the joint venturer with BHP in the Bass Strait fields, "accepted that the *Petroleum (Submerged Lands) Act* has effectively eliminated any risk that an offshore permit or license issued by either a State or the Commonwealth would be held invalid as an infringement of the authority or proprietary rights of the other."<sup>31</sup> The oil industry was also concerned over the implications of offshore industries for the "general body of Australian law" concerning such aspects as workers compensation, criminal law, income tax law.<sup>32</sup> The arrangements

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<sup>28</sup> A brief survey of the issues arising from offshore oil development in the 1960s in the U. S. A. is given by J.M. Murphy with M.H. Belsky "OCS Development: A New Law and a New Beginning", *Coastal Zone Management Journal*, 7, 2-3-4, (1980): 297-337; J.G. Liverman, "Without Precedent: The Development of North Sea Oil Policy", *Public Administration*, 60, (1982): 451-469 provides a similarly useful summary of developments in the United Kingdom.

<sup>29</sup> J. H. Hamlin, Comment on Lumb "Sovereignty and Jurisdiction Over Australian Coastal Waters" *Australian Law Journal*, 43, (October 1969): 445.

<sup>30</sup> See M. Haward, "The Australian Offshore Constitutional Settlement" *Marine Policy*, 13, 4 (October 1989): 335. The desire to expand the economic rent from offshore oil and gas production is a common feature of the development of oil and gas regimes in various countries. See, for example J.G. Liverman, "Without Precedent: The Development of North Sea Oil Policy": C. Hunt, *The Offshore Petroleum Regimes of Canada and Australia*, (Calgary: Canadian Institute of Resources Law, 1989); M. Haward, "Intergovernmental Relations and Offshore Resources Policy in Australia and Canada", *Australian - Canadian Studies*, 9, 1&2 (1991): 35-51.

<sup>31</sup> J. H. Hamlin, Comment on Lumb "Sovereignty and Jurisdiction Over Australian Coastal Waters": 445.

<sup>32</sup> *Ibid.*

embodied in the 1967 Agreement where the operation of day-to-day activity was administered under laws appropriate to the State in whose adjacent area the activity was taking place was accepted by the industry as "good sense".<sup>33</sup>

The 1967 Petroleum Agreement relied upon all parties giving effect "to the true meaning and spirit thereof"<sup>34</sup> of this intergovernmental arrangement. This provided stresses in subsequent years as the Commonwealth moved to unilaterally assert jurisdiction from low water mark, affecting oil and gas arrangements. Given the importance of the 1967 Petroleum Agreement in developing an intergovernmental regime for offshore oil and gas it is a useful exercise to consider what it *did not* attempt to do. It sidestepped the resolution of competing jurisdictional claims over the offshore and did not establish "legal relationships justiciable in a Court of Law".<sup>35</sup> In addition the Commonwealth and State governments agreed to:

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<sup>33</sup> Commonwealth of Australia, "Offshore Minerals other than Petroleum" *Parliamentary Paper* 89, 1970. The issue of the management of "offshore minerals other than petroleum" was discussed several times during the negotiation over the 1967 Petroleum Agreement. Given the need to develop legal and administrative frameworks for petroleum exploration and production the development of such policy tended to be placed on the "back burner". Several meetings were held in the late 1960s, a list of which, together with correspondence and documents relating to the Commonwealth - State discussions was released as a Parliamentary Paper of the Commonwealth Parliament in 1970. Given the lack of pressing demand for exploration titles the foreshadowed intergovernmental regime did not eventuate. The attempt to conclude a similar arrangement for offshore minerals within the ambit of the Offshore Constitutional Settlement in the late 1970s also failed to eventuate with Commonwealth legislation (without complementary State Acts) being proclaimed in February 1990.

<sup>34</sup> *Ibid.*

<sup>35</sup> 1967 Petroleum Agreement S26, quoted in A. G. Lang, and M. Crommelin, *Australian Mining and Petroleum Laws* (Sydney: Butterworths, 1979): 227.

refrain from amending such legislation except in accordance with a prior agreement to do so. In addition, the governments agreed not to make, amend or repeal regulations under the legislation except in accordance with prior agreement to do so.<sup>36</sup>

Such an accommodation became more difficult to maintain as the Commonwealth was able to reinforce its claims offshore as a result of a number of events. The decision of the Canadian Supreme Court in the *BC Offshore Oil Reference* in 1967 and the comments of Justices Barwick and Windeyer in *Bonser v La Macchia* in 1969 placed stress on the Petroleum Agreement. Given the lack of any obvious counterfactual it is difficult to predict what would have occurred if the *BC Offshore Oil Reference* had been made sooner or if the substantial reserves in Bass Strait had been discovered earlier. In the former case it is likely that the Commonwealth would have struck a harder bargain, while in the latter the States, initially at least, would have been in a stronger position in terms of revenue-sharing arrangements. In any event neither hypothetical situation would have necessarily avoided the need for an agreement nor precluded the lengthy battles witnessed during the OCS negotiations.<sup>37</sup>

The 1967 Petroleum Agreement epitomised to Sawyer "the machinery of co-operative federalism" where the "States [play] the main part in legal regulation and administration and the Commonwealth [serves] to co-ordinate inquiry, general policy formulation and standard setting, and specifying budget priorities by direct conditional grants or by influencing State decisions in the spending field in other ways."<sup>38</sup> The relative

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<sup>36</sup> Ibid.

<sup>37</sup> Such considerations were also reflected in the interaction over offshore oil and gas in Atlantic Canada in the 1980s.

<sup>38</sup> G. Sawyer "Conservation and the Law" in A.B. Costin and H. F. Frith (eds.)

strengths of the Commonwealth and States in the bargaining leading to the agreement was succinctly expressed by Sawyer in evidence to the Senate Select Committee on Offshore Petroleum Resources. He viewed that:

[s]o long as the Commonwealth and the States have reasonably comparable bargaining positions, there is no peril to federalism in the arrangement of this kind. Such bargaining equality is amply secured in relation to the present subject [the 1967 Agreement], because the Commonwealth derives substantial bargaining strengths from its claims to the control of the Continental Shelf under the 1958 Convention on the Continental Shelf, whereas the States have substantial bargaining power deriving from their claims to the first three miles of the territorial sea and the control of shore installations and subsequent treatment and distribution on shore.<sup>39</sup>

In spite of Sawyer's claim that the States had sufficient resources to ensure a bargain was concluded, O'Connell returned to the fundamental complication to this accommodation:

Considering the total national interest one wonders if the finding of the United States Supreme Court that the federal government has paramount rights in the offshore area is not the cogent policy consideration for Australia. At the same time it must be recognized that the United States for internal political reasons has had to hand the territorial sea back to the States and that pressure is mounting in Canada to do the same with respect to the Provinces. The Australian Constitution might not prove amenable to such a political solution, so that a judicial finding that the territorial sea is extraterritorial to either or both States and Commonwealth might prove irrevocable. Until these conundrums are resolved a national maritime policy will be

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*Conservation*, rev. ed. (Ringwood, Penguin 1974) quoted by D. E. Fisher, *Environmental Law in Australia*, (St. Lucia: University of Queensland Press, 1980): 30.

<sup>39</sup> Parliament of Australia *Report of the Senate Select Committee on Offshore Resources*, 180.

difficult to formulate.<sup>40</sup>

Not surprisingly, given its significance in terms of offshore resources policy and its practical impacts on Australian federalism, the 1967 Petroleum agreement has been analysed in considerable depth.<sup>41</sup> It was described in the 1970s as the most complex and innovative intergovernmental agreement yet negotiated: "the co-operative agreement which was signed in 1967 attempted to make provision for the responsibilities, needs and policies of all governments, in a way unique not only in the history of Australian federalism, but also in the settlement of the problem of jurisdiction over the offshore areas in federations elsewhere."<sup>42</sup>

The legislative design and administrative arrangements established

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<sup>40</sup> D.P. O'Connell 'Comment on Lumb 'Sovereignty and Jurisdiction' *Australian Law Journal*, 43 (October 1969): 443.

<sup>41</sup> See for example R. D. Lumb, "The Offshore Petroleum Agreement and Legislation", *Australian Law Journal* 41, (February 1968); R. D. Lumb, *The Law of the Sea and Australian Offshore Areas* (2nd ed) (St Lucia, University of Queensland Press), 1978; C. W. Harders, "Australian Offshore Petroleum Legislation: A Survey of its Constitutional Background and its Federal Features", *Melbourne University Law Review*, 6 (September 1968); C. Wells, (Saunders) *Co-operative Federalism in Australia*, Unpublished Ph.D. Thesis University of Melbourne 1975; P. C. Reid, "Commonwealth-State Relations Offshore Mining and Petroleum Legislation; Recent Developments: An Historic Milestone or Millstone?" *Australian Mining and Petroleum Law Journal*, 2, 2 (1980); R. Cullen, *Australian Federalism Offshore*, Intergovernmental Relations in Victoria Programme, (Melbourne, University of Melbourne Law School) 1985; R. Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes*, (Sydney: Federation Press, 1990); M. Haward, "The Australian Offshore Constitutional Settlement", *Marine Policy*, 13, 4, (October 1989): 334-348.

<sup>42</sup> C. Wells, (Saunders) *Co-operative Federalism in Australia*, Unpublished Ph.D. Thesis University of Melbourne 1975, 315. See also C. W. Harders, "Australian Offshore Petroleum Legislation: A Survey of its Constitutional Background and its Federal Features", *Melbourne University Law Review*, 6 (September 1968): 415-428.

under the agreement were undoubtedly unique, although it is also clear that actors close to the process saw the agreement as part of a continuing process of intergovernmental co-operation within the Australian federal system. The Report from the Senate Select Committee on Offshore Resources indicated that:

the legislation was stressed by several witnesses to be a remarkable example of co-operative federalism. The Committee accepts that it is probably the most striking indication of co-operative action in a complex field that Australia has witnessed. It is the latest in a long line of legislative and administrative compromises which the states and the commonwealth have created in a mutual agreement as to what serves the national interest in order to overcome the legal hurdles which the Constitution establishes.<sup>43</sup>

A similar view was expressed in *The Australian Law Journal*, which observed that:

[t]he Petroleum (Submerged Lands) legislation of both Commonwealth and States, passed in 1967, is a good example of cooperative federalism. Adaptation to such new needs in Australia is dependent on political and administrative ingenuity and cooperation, in view of the freezing of judicial doctrine recently commented on, and the unwillingness of electors to support drastic formal changes in constitutional structure. The long litigation in the United States over constitutional competence may well be avoided. Some criticism has been made of the wide powers vested in the State authorities over the granting of licenses but the commonwealth retains control under its constitutional powers by virtue of an intergovernmental agreement signed before the legislation was introduced. It would seem that no State would act contrary to it because of the risk of re-opening the whole constitutional question.<sup>44</sup>

The extent to which either the States or the Commonwealth were able

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<sup>43</sup> Ibid. 179.

<sup>44</sup> Anon. "Comment on Lumb 'Sovereignty and Jurisdiction Over Australian Coastal Waters' *Australian Law Journal*, 43, (October 1969): 439



to develop independent policy positions without challenging the agreement raised further issues. Lumb noted that:

the agreement embodying the principles on which the legislation is founded is dated 16th October 1967 - two days before the Bills were presented in the Parliaments. It is an intergovernmental agreement, signed, as has been said, by the Prime Minister and all the Premiers on behalf of their Governments. Clause 26 of the Agreement acknowledges that the agreement is not intended to create a legal relationship justiciable in a court of law, but declare that the agreement shall be construed and given effect to by the Parties in all respects according to the true meaning and spirit thereof. It is clear that this clause has the specific effect of excluding the agreement from the class of agreements which would, according to the principles of contract, be given effect to by a court of law.<sup>45</sup>

Such legal formalities were to prove fortuitous in the mid 1970s with the intergovernmental issues arising from the *Seas and Submerged Lands* case. As Harders commented:

[l]egislative co-operation is necessarily part and parcel of the Australian federal system and measures adopted with regard to offshore petroleum can, I suggest, be fairly regarded as a continuation and development of the process. I say "development" because, on close analysis, the offshore petroleum scheme differs in certain respects, I believe, from what has gone before.<sup>46</sup>

The influential report of the Senate Select Committee on Offshore Resources, released in late 1971,<sup>47</sup> saw the 1967 Agreement as an important outcome of intergovernmental co-operation. This Select Committee was established in November 1967 in response to issues

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<sup>45</sup> R. D. Lumb, "The Offshore Petroleum Agreement" 453-454 (emphasis added).

<sup>46</sup> C. W. Harders, "Australian Offshore Petroleum Legislation", 417.

<sup>47</sup> Parliament of Australia, *Report of the Senate Select Committee on Offshore Resources*, Vol. One - Report, (Canberra: Commonwealth Government Printing Office, 1972).

arising from the passage of the *Petroleum (Submerged Lands) Bill* 1967 through the Commonwealth Parliament.<sup>48</sup> The Committee's terms of reference included examining whether the legislation establishing the 1967 Agreement was consistent with the constitutional responsibilities of the Commonwealth and the States; whether the system of administration established by the 1967 Agreement was the most effective way of utilising the offshore petroleum resources; whether the legislation made provision for free interstate trade in gas and oil; whether the level of royalties was in the national interest; whether permit areas granted under the legislation were too large; whether proper provision is made relating to permit renewals; and the provisions of the legislation generally.<sup>49</sup> Prior to the Committee bringing down its final report it released an interim report in September 1970 "having regard [in part] to the recent introduction in the House of representatives of a Bill for an Act relating to the Territorial Sea and certain other Waters of the Sea and to the Continental Shelf, the committee believes that it would be recreant in its duty if it did not report as soon as it was able to do so."<sup>50</sup>

The interim report criticised several areas of the 1967 agreement

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<sup>48</sup> The Select Committee, under various chairmen, met for three and a half years and took evidence from eighty four witnesses. It had been established when the ALP attempted to refer the package of Bills associated with the 1967 agreement to a select committee. An amendment to this effect was lost, but the Government accepted a compromise suggested by Senator Wright (Tasmania) that after the passage of the Bills was completed a select committee be set up to inquire into and report upon offshore Petroleum resources in Australia. *Parliament of Australia Report of the Senate Select Committee on Offshore Resources*: (Vol. One - Report): 1.

<sup>49</sup> This paragraph is derived from the terms of reference of the *Report of the Senate Select Committee on Offshore Resources*: 2.

<sup>50</sup> *The Senate Select Committee on Offshore Petroleum Resources, Interim Report* (September 1970): 4.

including the presentations of completed intergovernmental agreements as "faits-accomplis" to the Parliaments of Australia. The design of the administrative arrangements, as much as the structure of the legislation, led to considerable criticism from commentators such as Professors Sawer, Richardson, Cowen and Reid regarding the implications for such an arrangement on the doctrine of ministerial responsibility.<sup>51</sup> While the Select Committee found, *inter alia*, that the constitutional basis of the *Petroleum (Submerged Lands)* legislation is inconsistent with what should be the proper constitutional relationship between the parliament and the executive, it concluded that the legislation was not "inconsistent with the 'proper responsibilities' of the Commonwealth and the States because, as a result of the decision to avoid litigation which would have resolved the matter, it cannot say what is the measure of those proper constitutional responsibilities."<sup>52</sup> In order to resolve the "proper constitutional responsibilities" one of the Select Committee's specific recommendations was "[t]hat the Commonwealth do not leave unresolved and uncertain the extent of State and Commonwealth authority in the territorial sea bed and the Continental Shelf."<sup>53</sup>

Although the petroleum industry, and the State governments, had made much of the disruptive effects of the Whitlam government's attempt to resolve the extent of Commonwealth power offshore<sup>54</sup> the design of the 1967 agreement, and particularly the mirroring of

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<sup>51</sup> See *Report of the Senate Select Committee on Offshore Resources* see paragraphs 6.156-6.169: (145-150)

<sup>52</sup> *Ibid*: 7.

<sup>53</sup> *Ibid*: 31.

<sup>54</sup> See M. Haward, *Institutions, Interest Groups and Marine Resources Policy* Unpublished MA Thesis, Department of Political Science, University of Tasmania, (1986).

Commonwealth and State legislation, removed any constitutional doubt to the validity of the award of exploration permits or production licenses.<sup>55</sup> As Reid comments

the congenial scheme [forming the 1967 Agreement], although giving security of title to the companies operating in this area, merely postponed, but as we now know did not ultimately prevent, the subsequent conflict concerning questions of offshore jurisdiction. <sup>56</sup>

### Commonwealth Claims and State Responses: Challenges to the Petroleum Agreement

In the late 1960s a change in leadership within the Liberal Party led to the Commonwealth adopting a more activist approach to asserting jurisdiction in the territorial sea, encouraged in part by the precedent of increasing federal involvement in offshore management in the United States and Canada. The Gorton government introduced the *Territorial Sea and Continental Shelf Bill* in 1970 which claimed Commonwealth sovereignty over the territorial sea. In initiating this legislation the government announced that:

the object is to carry out the government's decision to introduce legislation asserting and establishing the exclusive right of the sea bed off the Australian coast, from low water mark to the outer limits of the continental shelf. At present the State governments claim sovereign rights in this same area. <sup>57</sup>

The Commonwealth's unilateral decision to overturn the 1967 Petroleum Agreement was influenced by several developments

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<sup>55</sup> G. Stevenson, *Mineral Resources and Australian Federalism* Research Monograph 17, (Canberra: CRFFR/ANU, 1976): 39-40.

<sup>56</sup> P. C. Reid, "Commonwealth-State Relations Offshore Mining", 60.

<sup>57</sup> J. Killen, *Killen: Inside Australian Politics*, (Sydney: Methuen Haynes, 1985): 158.

occurring in the late 1960s. Moves within the United Nations to convene a Third Conference on the Law of the Sea, spearheaded by the Maltese Ambassador to the United Nations, Arvid Pardo, occurred at this time, and influenced the Australian debate on the offshore. Domestic politics were influenced by the flurry caused by the judgements of Justices Barwick and Windeyer in *Bonser's* case, and highly publicised incidents involving foreign fishing ventures close to Australian territorial waters. Concern over oil pollution from tanker groundings increased in the wake of the *Torrey Canyon* disaster off Great Britain in March 1967. In 1969 the discovery of the Soviet prawn trawler *Van Gogh* fishing within the Gulf of Carpentaria close to Australian territorial limits raised considerable concern over the level of surveillance offshore. The threat of an oil spill from the grounded tanker *Oceanic Grandeur* within the Great Barrier Reef highlighted problems in providing adequate management or protection of the Australian territorial sea. Conflict over oil exploration in the Great Barrier Reef region in the wake of the controversy over the *Oceanic Grandeur* incident has been seen as a trigger for the Territorial Sea Bill.<sup>58</sup>

The outright opposition of the States to the proposed legislation and the Federal Liberal Party's discomfort with Gorton's vision of federalism epitomised by the *Territorial Sea and Continental Shelf Bill* resulted in considerable conflict within the party. Claims of a "creeping centralism" in policy from the State branches and State parliamentary parties impacted directly on the fate of the "Gorton Bill", with the Liberal Party's attitude towards jurisdiction offshore being

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<sup>58</sup> Ibid.

greatly affected by this internal party dispute. Gorton, although alleged to be a "centralist" by his own party, disputed the accusation and, for that matter, the appellation. In his address to the Liberal Party's Federal Council in early June 1970, Gorton gave his view of federalism and the Australian federal system.

In his address today, the President referred to the word "centralism" and "centralist". I am not entirely sure what these words mean for they are rarely defined by those who use them. But if they mean a system or person who wants all power, all policy-making, all administrative decisions concentrated in one place, then there are none of us here who could possibly be described as centralist. . . . Similarly, if a federalist is one who believes that a national government should have no responsibility and no voice in matters of nation-wide importance as education or health or national development or agriculture or in any other fields, that there is no room there for co-operation between a national government and a state government, then I do not think that person is a true federalist or serves the nation well.<sup>59</sup>

Much of the antagonism between the Commonwealth and each of the State governments centred on Gorton's attempt to assert sovereignty and Commonwealth paramountcy offshore. Even though the Liberal Party had been founded on a principle of retaining the federal system in the face of the perception of the Chifley government's centralisation and nationalisation objectives, it had presided over a period of expansion in Commonwealth power, helped, without a doubt, by financial influence it gained by the High Court upholding *The Uniform Tax* cases in 1942 and 1956. The Liberal Party however retained a particular view of the "federal principle" as an article of faith, and used it effectively in the election campaigns of the 1950s and

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<sup>59</sup> J. G. Gorton, "Address to Federal Council" 8 June 1970 reprinted in Y. Thompson, G. Brandis, and T. Harley, (eds.) *Australian Liberalism: The Continuing Vision*, (Melbourne: Liberal Forum Publication, 1986): 100.

1960s. In 1970 "Gorton attempted to modernise the party platform by reducing its heavily federal emphasis."<sup>60</sup> This was undertaken, according to Emy, as "a necessary prelude to giving authority to the federal government to act alone in such controversial matters as the control of off-shore minerals exploration."<sup>61</sup>

Gorton's review of the party platform was stymied for exactly the same reasons as his offshore scheme foundered: the States saw it as a removal of their power and autonomy and a reduction of their influence in the determination of party policy, or at least the possibility of being able to influence party policy through the Federal Council of the Party. The "Gorton Bill" was later to lapse with the proroguing of parliament on October 24th before the 1972 election - held on the 2nd December 1972, but not before it led to a further split in the parliamentary party and the resignation of Gorton. The second reading speech for the *Territorial Sea and Continental Shelf Bill* continued for most of the afternoon of the 18th October 1972. Gorton's attempt to increase Commonwealth powers offshore focussed on the issue of jurisdiction over oil and gas, but also included a major battle with Queensland over State proposals to undertake exploratory oil drilling in the reef region. This battle<sup>62</sup> saw the the question of jurisdiction being raised first in relation to the State government's proposals and second in terms of attempts to get Commonwealth protection for the Great Barrier Reef.

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<sup>60</sup> H. V. Emy, *The Politics of Australian Democracy* (2nd ed) (Melbourne: Macmillan, 1978): 662.

<sup>61</sup> Ibid.

<sup>62</sup> As described in the title of a book detailing an account of the imbroglio by one of the major actors; see J. Wright, *The Coral Battleground*, (Melbourne: Nelson, 1977).

David Solomon's account of the Gorton era sees the dispute arising from the introduction of the *Territorial Sea and Continental Shelf Bill*<sup>63</sup> as a central element of the corrosive Commonwealth - State relations in this period:

. . . the question of off-shore mineral rights . . . [was] a subject which developed into a major row during Mr Gorton's period as Prime Minister. He eventually gained some support from the Liberal party on the basis that Commonwealth legislation was necessary so as to allow the High Court to make the decision one way or the other.<sup>64</sup>

The *Territorial Seas and Continental Shelf Bill* was to have a tortuous path through the parliament. It was introduced and given a second reading on the 16th April 1970 with debate not resuming until the 18 May 1972. By the time the second reading debate was resumed Gorton had "abdicated" the leadership of the Liberal Party and the position of Prime Minister in the face of a tied cabinet room ballot, refusing to use a casting vote to retain office. The drafting of the *Territorial Sea and Continental Shelf Bill* was greatly influenced by Gorton's Attorney-General, T. E. F. Hughes. Hughes was to remain a staunch supporter of the Bill, and, along with Gorton and Jim Killen, was to continue to support the Bill in the face of considerable back-bench disquiet over the proposal. The second reading speech for the *Territorial Sea and Continental Shelf Bill* continued for most of the afternoon of the 18th October 1972. Debate ended with Gorton moving the gag. The ALP

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<sup>63</sup> D. Solomon, "Commonwealth-State Relations" in M: Harris and G. Dutton (eds.) *Sir Henry, Don Baby and Friends*, (Melbourne: Sun Books, 1971).

<sup>64</sup> *Ibid.* 206.



supported the motion and with John Gorton and Jim Killen "crossing the floor" the government held a two vote majority. Hughes. (Gorton's Attorney-General) absented himself from the chamber without a pair during the vote.<sup>65</sup>

On the same day the *Territorial Seas Bill* was introduced Gorton agreed to table, *with the consent of the States*, minutes of meetings between them and the former Minister for National Development (Mr Fairbairn) concerning the proposed legislation.<sup>66</sup> A major dispute arose between Fairbairn and Gorton over the extent to which the meetings, the first of which was held on the 3rd March and the second on the 22 September 1969, could be regarded as fulfilling the Commonwealth's commitment to consultation with the States. At the March meeting Fairbairn had told State ministers:

I can certainly give an assurance that the States will be consulted again before any legislation is brought in. I know that it is sometimes difficult to keep something of this sort confidential, but I do urge you to keep this document confidential.<sup>67</sup>

A motion to censure Gorton was moved by the Opposition on the 15th May over his handling of the matter. This censure proved to be the breaking point for many in the Parliamentary Liberal Party. Soon after a party room vote was held which led to Gorton stepping down as party leader and Prime Minister.

Prior to Gorton's resignation the "correspondence and documents

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<sup>65</sup> E. G. Whitlam, *The Whitlam Government*, (Ringwood: Penguin, 1985): 257.

<sup>66</sup> Ibid.

<sup>67</sup> Extract from Proceeding of The Second Meeting of the Australian Minerals Council" Parliament of Australia, *Offshore Minerals Other Than Petroleum* Parliamentary Paper No 89 1970 (Canberra: Commonwealth Government Printing Office, 1970): 10.

relating to offshore minerals other than petroleum" were tabled in Parliament on the 8th May 1970. The Parliamentary Paper comprised 71 pages of letters between the Commonwealth and State Ministers and transcripts of meetings of ministerial councils and press releases. The paper provides a clear statement of the Gorton government's attitude to the question of jurisdiction in offshore areas on the basis of the Commonwealth claim for paramountcy. This led, inevitably, to the Commonwealth's questioning the arrangements and division of responsibility established under the 1967 Petroleum Agreement.

The Commonwealth's concern over these matters had been announced by Fairbairn at the second meeting of the Australian Minerals Council in Canberra on 3rd March 1969. Fairbairn stated that:

[i]n the case of offshore petroleum both the States and federal government asserted jurisdiction over the seabed beneath territorial waters and over the outer continental shelf. The essential element in the petroleum arrangement . . . [is that the Commonwealth and States] should co-operate for the purpose of ensuring the legal effectiveness of authorities to explore for, or to exploit the petroleum resources of the submerged lands off our coasts.<sup>68</sup>

The Commonwealth's view was that it should "assert total rights outside the three mile limit". Fairbairn believed that the administration of the mineral activity should be undertaken in a similar manner to that established by the 1967 agreement. When questioned on when legislation establishing the Commonwealth's position would be introduced into parliament Fairbairn replied "that

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<sup>68</sup> Parliament of Australia, *Offshore Minerals Other Than Petroleum* Parliamentary Paper No 89 (1970): 4. This document provides an important source of material and indicates the flurry of activity surrounding the "Gorton" proposals.

no date has been set, but I assume it will be done as soon as possible. I think it would be doubtful that we could get legislation through during the Autumn session this year [1969]."<sup>69</sup>

Dissent from within the Liberal Party,<sup>70</sup> reflecting in part the opposition from the States to the proposal of Commonwealth jurisdiction, led to the *Territorial Sea and Continental Shelf Bill* being stalled before it had completed its passage through the parliament. The dispute over the proposed legislation occurred at two levels, the major conflict was between the Commonwealth and the States although an equally acrimonious battle was being fought within the federal parliamentary Liberal Party. Within the Party '[a]ntagonism to the move for the Commonwealth to assume sovereignty over the sea bed was assiduously cultivated"<sup>71</sup> as a means of deposing Gorton. The loss of seats in the 1969 election, Gorton's leadership style, and his determination to proceed with the *Territorial Seas Bill*, provided ammunition to "those waiting for an opportunity to get rid of John Gorton."<sup>72</sup>

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<sup>69</sup> Ibid. 7.

<sup>70</sup> The unpopularity of what became known as the "Gorton Bill" and its influence on the events leading to Gorton's eventual resignation from the leadership of the Liberal Party (and, as a result, from the position of Prime Minister) is interesting in the light it sheds on the influence of the States in offshore matters prior to the *Seas and Submerged Lands Act*. The reaction of the States to the "Gorton Bill" is also interesting in terms of the Fraser governments introduction of the OCS. For details of the problems faced by Gorton see H. V. Emy, *The Politics of Australian Democracy* (1st ed.) (Melbourne: Macmillan, 1973): 204; and E.G. Whitlam "The Cost of Federalism" in A. Patience and J. Scott, *Australian Federalism: Future Tense* (Melbourne: Melbourne University Press, 1983): 41.

<sup>71</sup> J. Killen, *Killen*, 157.

<sup>72</sup> Ibid.

Gorton's views sat uneasily with the parliamentary Liberal party, faced with a revolt from the State parliaments and party machines over the offshore Bill.<sup>73</sup> After Gorton resigned the newly appointed party leader and Prime Minister, McMahon, tried to avoid the conflict which was rapidly engulfing the *Territorial Sea Bill* by placing it at the foot of the House of Representatives notice paper - a tactic attacked by Opposition Leader Whitlam. More significantly the key architects of the ill-fated Bill, Gorton and Hughes and Killen, were all demoted or dumped during the ministerial reshuffle which followed the defeat of Gorton.

On the 7th December 1971 Whitlam attempted to move for the suspension of standing orders to make the *Territorial Seas Bill* a matter of urgency. He highlighted the history of the Bill following its introduction in April of the previous year.

On the last sitting day in the Autumn session last year, 12th June 1970 it was [Bill] No 11. There were still 12 Bills after it on the notice paper. But on the the first day of the Budget session last year, 16th August, it was No 16. It was the last of the Bills listed on the notice paper and ever since it has been the last of the bills listed on the notice paper. The House has been, I suggest, extremely patient in this matter.<sup>74</sup>

Whitlam went on to state that the bill was currently listed last on the notice paper, Bill No 52.<sup>75</sup>

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<sup>73</sup> The backbench concern over Gorton's performance was clearly a major factor in the tied vote in the party room. Reid claims that "on my count three House of Representatives' Ministers, and twenty two backbench Liberal MHRs had voted 'no confidence' in Gorton. Gorton's Senate strength had also eroded. Eight out of twenty liberal senators had voted against him." A. Reid, *The Gorton Venture* (Sydney: Shakespeare Head Press, 1971): 443.

<sup>74</sup> Commonwealth Parliamentary Debates, (House of Representatives) 7/12/71 4140.

<sup>75</sup> Ibid.

In the period before the second reading debate on the *Territorial Seas Bill* resumed in October 1972, a series of meetings had been held between the Commonwealth and State representatives "to see whether this matter could be resolved in some other way".<sup>76</sup> The issues were discussed between officials and Ministers at the Australian Minerals Council and the Standing Committee of Attorneys-General.<sup>77</sup> These meetings preceded a meeting held in Canberra on the 10th August 1972 between the Commonwealth Ministers for Foreign Affairs and National Development and "appointed ministerial representatives"<sup>78</sup> from each State. This meeting has had little publicity, no doubt being buried under the weight and import of subsequent events including the electoral defeat suffered by the McMahon government.

In spite of the lack of publicity this ministerial meeting is significant and a communique was released which provides the position of the States towards the "offshore question". The communique was incorporated into Commonwealth Hansard during the speech by Mr N. H. Bowen (then Minister for Foreign Affairs) on the 18th October 1972.<sup>79</sup> It reads:

The meeting then examined questions concerning the territorial sea and continental shelf under Australia's federal system. The meeting identified problems for the Commonwealth and the States in regard to these matters and explored possible courses of future action. The Commonwealth emphasised the desirability of removing legal uncertainties as to where sovereignty lay. While this was recognised by the States, they all took the view that a possible series of legal cases was not a satisfactory method. One

<sup>76</sup> Commonwealth Parliamentary Debates, (House of Representatives) 18/10/72 2770.

<sup>77</sup> Ibid. 2784

<sup>78</sup> Ibid.

<sup>79</sup> Ibid. 2784-2785.

proposal was put forward was that the preferable method in the long term would be to determine the the question by constitutional amendment. It was suggested that it might be one of the matters brought before the Constitutional Review Convention. The States unanimously affirmed their opposition to the Territorial Sea and Continental Shelf Bill and their preference for finding a solution through co-operation between the Commonwealth and the States. . . . The States put forward the view that an examination should be made of the feasibility of -

1. A Solution of the problem of off-shore minerals by means of complementary State and Commonwealth legislation;
2. A resolution of legal questions surrounding control of the territorial sea and the continental shelf by means of Commonwealth- State co-operation;
3. Defining the internal waters of the States and the Base lines from which the territorial sea is measured by means of consultation between the Commonwealth and the States.<sup>80</sup>

The communique encapsulated the States' arguments for a co-operative solution to the impasse that had arisen over the *Territorial Sea and Continental Shelf Bill*. Bowen also informed the House that these matters had been discussed by cabinet which had agreed that further negotiations were warranted given the substance of the States concerns. As a result:

[o]n 5th September the Prime Minister (Mr McMahon) wrote to each State Premier informing him that the Commonwealth was agreeable to the suggested discussions and studies taking place. Since 5th September all State Premiers have replied favourably to the Prime Ministers letter. So, with the agreement of all existing State governments and the Commonwealth government, it has been decided that it is responsible and proper now to put to study these matters of internal waters, the means of resolving the question and co-operative legislation in relation other than off-shore petroleum.<sup>81</sup>

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<sup>80</sup> Ibid. (Emphasis added).

<sup>81</sup> Ibid. 2785.

The States agreed to study these matters. Bowen stated that the government "properly" took "the view that it should not at this time seek to force the Bill through parliament".<sup>82</sup> The Leader of the Opposition, Mr Whitlam, responding to Bowen's speech claimed that the McMahon government had made an about face on the *Territorial Sea and Continental Shelf Bill*<sup>83</sup> and that the arguments that the government did not wish to proceed with the Bill "at this time" contrasted with the introduction of the Bill as a matter of some urgency in April 1970. Whitlam also dismissed the possibility of gaining agreement with the States, arguing that "we can gain no comfort from the history of Commonwealth - State agreements in these matters."<sup>84</sup>

The States were concerned that the Gorton Bill still remained on the notice paper, although McMahon assured the States that no unilateral action would be taken by his government to enact it. The SCAG had considered the *Territorial Sea Bill* at meetings in 1971, when the only ALP State government (South Australia) supported the Liberal and Country - Liberal States in investigating mechanisms to overturn the legislation. The South Australian government commissioned an opinion from Professor D. P. O'Connell, then Professor of International Law at the University of Adelaide. O'Connell, an expert on the law of the sea, "advised a petition to the Queen to refer the dispute to the Privy Council under the *Judicial Committee Act* 1833, on the ground that it was a territorial dispute between British Colonies."<sup>85</sup> While this tactic was not needed in response to the controversial but ill-fated "Gorton Bill", O'Connell's advice was to be followed up when the

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<sup>82</sup> Ibid.

<sup>83</sup> Ibid. 2786.

<sup>84</sup> Ibid. 2787.

<sup>85</sup> E .G. Whitlam, *The Whitlam Government* 603

Whitlam government introduced its own legislation (the *Seas and Submerged Lands Act*) establishing Commonwealth sovereignty from low water mark in 1973.

Although generating much intra-party conflict, intergovernmental interaction over the Gorton Bill lacked the partisan dimension of later conflict over the offshore arising from the Whitlam government's assertion of paramountcy. The intergovernmental dispute over the *Territorial Seas Bill* was driven less by partisan differences than from differences between the Commonwealth and the States over jurisdiction which surfaced in what became a bitter *intra* party struggle. Whitlam has recounted that:

the Bill was introduced at a time when, for the first time since 1909, there were no ALP governments in Australia. The five Liberal Premiers and the Country Party Premier combined to oppose the Gorton government's legislation. The tension between the Federal and State Governments was a principal ingredient in Gorton's demise as Prime Minister.<sup>86</sup>

### **The Politics of Commonwealth - State Relations: The Great Barrier Reef**

The issue of oil drilling on the Great Barrier Reef provided a further impetus for the Commonwealth and the States to confront issues which had been neatly avoided in the 1967 Agreement. It was clear that the 1967 Agreement, while accommodating the desires of the States to exercise control over offshore oil and gas exploration and the Commonwealth's support for exploiting these resources, could not accommodate differing views over exploration in environmentally

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<sup>86</sup> Ibid. 256



sensitive areas. The 1967 Agreement was, as its title and preamble state, a means of controlling and regulating exploitation of the hydrocarbon resources rather than incorporating environmental controls. Queensland resisted any attempt from the Commonwealth to restrict the issue of exploration permits, beginning a major dispute with the Commonwealth which lingered until the late 1970s.

Seismic surveys and other preliminary work had been carried out in the Great Barrier Reef in the mid 1960s, following the discovery of oil in the offshore Gippsland Basin. Although permits had been issued for exploratory drilling on the Reef since the 1920s, it was only the increased interest in oil and gas in the mid 1960s which caused some concern over the environment of the reef. Six wells had been drilled between 1926 and 1969 with "the first two . . . quite shallow and intended to provide geological information of a general kind and not concerned with discovering oil."<sup>87</sup> Between 1968 and 1969 three oil wells were drilled offshore from the Reef and were the focus of considerable public concern. Permits for exploratory drilling were issued by the Queensland Government under the terms of the 1967 Petroleum Agreement.

The stand-off over the Barrier Reef increased academic interest in the question of offshore jurisdiction. Sir Percy Spender, one-time Foreign Minister under Prime Minister Menzies, Ambassador to the United States and member and President of the International Court of Justice, prepared an opinion that the Commonwealth had the power to stop drilling on the Great Barrier Reef. Spender based his opinion on

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<sup>87</sup> *ibid.* 512. For details of early exploration on the Reef see Anon. "Origins of the Great Barrier Reef Committee" *Diving Downunder* 16,1 (July-October 1989): 33-34.

the view that State jurisdiction ended at low-water mark, following the argument in the *Franconia* case. Spender's views were given at a symposium on "The Future of the Great Barrier Reef" convened by the Australian Conservation Foundation in May 1969. Spender concluded that:

1. Excluding what are commonly known as inland waters, the territorial boundaries of Queensland and other Federal States end at low water mark.
2. The Territorial sea bordering Australia and the sea bed thereof with all its natural resources are those of the Commonwealth, not those of any Federal State.
3. Dominion over the sea bed and the natural resources of the whole of the Continental shelf commencing at low water mark, and the rights to explore and exploit these, or permit others to do so, is vested exclusively in the Commonwealth.<sup>88</sup>

The drilling of the exploratory wells and the Queensland governments insistence on its right to determine the resource development of the Reef resulted in an interesting and unique example of intergovernmental collaboration. Pressure on both the Commonwealth and the Queensland governments, both facing an election in 1969, led to the Prime Minister and Queensland Premier establishing a joint Royal Commission into oil drilling in the Barrier Reef. Joint commissions in themselves may not be unusual, however the mechanism used to set up the inquiry illustrated the influence of

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<sup>88</sup> P. C. Spender, "The Great Barrier Reef legal Aspects" in *The Future Of The Great Barrier Reef*, Australian Conservation Foundation Special Publication No 3 (Sydney: Australian Conservation Foundation, 1969): 38-39.

the unresolved issue of jurisdiction. The Royal Commission was established by separate decisions of the Commonwealth and Queensland governments and by separate letters patent issued by these governments.<sup>89</sup> In effect there were two royal commissions although both sets of letters patent appointed the same personnel to the inquiry. The establishment of the Royal Commission, which was to bring down its report in 1976 led to a moratorium on the exploration programme. The Queensland Premier Joh Bjelke-Petersen reaffirmed his view that his State should be responsible for management of the Great Barrier Reef.

The unresolved questions surrounding the 1967 offshore petroleum agreement, which had been referred to the Senate Select Committee on Offshore Resources, had become embroiled in the intergovernmental conflicts over the Barrier Reef. The long awaited report of the Senate Select Committee on Offshore Petroleum Resources was tabled in early December 1971 at the time the Labor Party was attacking the McMahon government for stalling the debate on the *Territorial Sea and Continental Shelf Bill* and while the Royal Commission into the exploitation of the Great Barrier Reef was taking evidence. It is somewhat ironic, given the conclusion of the Senate Select Committee recommending the Commonwealth act to resolve the constitutional uncertainty offshore, that the final report of the Senate Select

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<sup>89</sup> *Senate Select Committee on Offshore Petroleum Resources Report Vol1* (1971), 522

Committee was brought down at a time corresponding to the zenith of the States' exerting political pressure on the Commonwealth as a result of the *Territorial Sea and Continental Shelf Bill*. Such was the reaction of the States that the McMahon government, after considerable efforts, could not engineer an accommodation with the States to resolve the issue.

Tensions between the Commonwealth and the States increased in the late 1960s as a result of three primary factors: international developments, an expanding environmental agenda and a Commonwealth leadership attitude on both sides of the partisan fence favouring political centralisation. New international agreements and changing practices provided a pretext to expand the Commonwealth's influence over marine resources, a trend which was to continue for a quarter century. At the same time the Commonwealth was being encouraged by environmental groups to take action against State-initiated development projects with ecological impacts. Initially this focused on the need to protect the Great Barrier Reef from oil exploration permitted by Queensland and the threat to the Australian fishing industry from foreign fishing vessels. Demands for increased Commonwealth action were viewed favourable by Prime Ministers Gorton and Whitlam who philosophically favoured Commonwealth leadership in areas such as the offshore. Of these three, it is clear that the Commonwealth's increased involvement in the offshore reflected first and foremost its desire to assert an interest in areas which had previously been under the sole jurisdiction of State governments. The Commonwealth was able to use developments in

international law and pressure from various domestic interests to support its challenge to the intergovernmental arrangements which had been developed in the 1950s and 1960s.

### **The Challenge to the Status Quo: The Seas and Submerged Lands Act**

The ALP had signalled its support for the "Gorton Bill" and foreshadowed acting to assert Commonwealth sovereignty in the territorial sea when it achieved government. Opposition Leader Whitlam indicated the ALP's interest in changing the arrangements established by 1967 Petroleum Agreement, particularly in terms of revenue sharing with the States. The ALP's support for the Gorton Bill was reinforced by modifications to its platform prior to the 1972 election. The 1971 National ALP Conference held in Launceston, Tasmania, committed a future Labor government to assert sovereignty over offshore mineral resources.<sup>90</sup>

Given the ALP's attitude to offshore jurisdiction it was inevitable that the offshore would become a major battleground between the Whitlam government and the States. The battle-lines were drawn by the Commonwealth's aim to assert, or to increase the use of, constitutional heads of power in areas it considered to be of "national significance"<sup>91</sup> following its victory in the December 1972 federal election. The Whitlam government quickly asserted its view that the Commonwealth held constitutional primacy in relation to offshore

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<sup>90</sup> This conference was particularly important as it also saw an important change in the ALP's attitude towards federalism, with the "unification" clause in the party platform severely modified. See B. Galligan and D. Mardiste "Labor's Reconciliation with Federalism" *Australian Journal of Political Science*, 27, 1 (March 1992): 71-86.

<sup>91</sup> G. Evans, (ed.) *Labor and the Constitution 1972-75: Essays and Commentaries on Controversies of the Whitlam Years*, (Richmond: Heineman, 1977).

resources. It announced that it intended introducing legislation asserting Commonwealth sovereignty over these resources during the opening of the 28th parliament on the 27th of February 1973. This legislation, the *Seas and Submerged Lands Act 1973*, was to reshape the contours of Commonwealth - State relations over the offshore.

The proposed *Seas and Submerged Lands* legislation, already leading to acrimony between the States and the Commonwealth, was the focus of more controversy on the 16th May 1973 when the government successfully moved a suspension of standing orders to create series of "urgent Bills", including the *Seas and Submerged Lands Bill* and its associated *Seas and Submerged Lands (Royalties on Minerals) Bill*. In response to objections from the Opposition the Leader of the House (Mr Daly) argued that the offshore legislation had, in effect, been debated for three years. The Opposition criticised the undue haste of this move with senior Shadow Minister Mr Lynch arguing that "the Government recognises that today it is under major attack from significant sections of the Australian community . . . [including] the problems with the Labor States in terms of offshore legislation."<sup>92</sup> Amendments moved by Lynch to extend time for debate were defeated, leaving the *Seas and Submerged Lands* legislation (along with the *Pipeline Authority Bill 1973* and the *Prices Justification Bill 1973*) as urgent Bills. The time allotted for the two *Seas and Submerged Lands Bills* meant that all stages of the Bills were completed by 10 and 10.15 pm respectively on Thursday 17th May<sup>93</sup> - the next sitting day.

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<sup>92</sup> Commonwealth Parliamentary Debates, (House of Representatives) 16 May 1973: 2179.

<sup>93</sup> Ibid: 2182 (emphasis added)

The Opposition, through Mr Bowen, attempted to move a further amendment to the Seas and Submerged Lands legislation which stated "this House, while not declining to give the Bill a second reading and accepting that that the question of sovereignty should be determined, (a) deplores the method adopted by the Government of *proceeding without consultation with the States* especially in relation to the code which is contained in Part III of the Bill, and (b) is of the opinion that *consultations with the states for a co-operative regime* for controlling the exploitation of the resources and generous royalty distribution to the States should commence forthwith."<sup>94</sup> The Opposition attempted a further amendment later in the evening of the 17th May by removing the words "not declining to give the Bill a second reading speech". The guillotine was enacted and the "amended" amendment was lost.

The Opposition's argument gives an insight into the complexities of Commonwealth - State relations. The initial support for a resolution of the jurisdictional impasse contrasted with the McMahon government's agreement with the States that it would not to act unilaterally. The second amendment reflects the Liberal Party's concerns with retaining good relations with the States.

The *Seas and Submerged Lands Bill* and the *Seas and Submerged Lands (Royalties on Minerals) Bill* were passed by the House of Representatives on the 17th May and introduced into the Senate on the 22 May 1973. The Opposition leader in the Senate, Senator Withers, "immediately moved an amendment in Bowen's terms and added that the debate should resume on the first sitting day of the Senate after the 1[st of] August".<sup>95</sup> The Whitlam government's problems with a

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<sup>94</sup> Ibid., 17 May 1973, 2306.

hostile Senate, which was to contribute to its dismissal in late 1975, was also to play an important part in the dispute over offshore resources management. When parliament resumed after the winter recess the Liberal Party had decided to support the *Seas and Submerged Lands Bill* if the mining code, forming Part III of the legislation, was removed.

In late November the second reading of the *Seas and Submerged Lands Bill* was held in the Senate. Prior to this, with three months having lapsed without the Senate acting on the Bills, Connor reintroduced them to the House in mid September.<sup>96</sup> After opposition from the Country Party the Liberal Party and the Democratic Labor Party, Part III of the Bill was removed during the committee stage. The companion legislation to the *Seas and Submerged Lands Bill*, the *Seas and Submerged Lands (Royalties on Minerals) Bill 1973* was defeated in the Senate. This legislation was originally considered as one of the six triggers for the double dissolution of April 1974, however it

was not included in the Prime Minister's submission to the Governor-General. The drastic amendment of the companion to this Bill (*Seas and Submerged Lands Bill 1973*) made it futile to push on with this Bill.<sup>97</sup>

On the 28th November 1973 the Whitlam government accepted the alteration of the *Seas and Submerged Lands Bill* - the exclusion of the mining code (Part III of the Bill) - and the legislation, so modified, received assent on 4th December 1973. Although the States announced

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<sup>95</sup> E. G. Whitlam, *The Whitlam Government*:257.

<sup>96</sup> Ibid: 256.

<sup>97</sup> C.J. Lloyd and G.S. Reid, *Out of the Wilderness: The Return of Labor*, (Melbourne: Cassell, 1974): 370.



their intention to challenge the validity of the latter legislation, Connor

then introduced, in July 1974, Part III of the Act as the *Minerals (Submerged Lands) Bill*. The House twice passed it but the Senate, on the pretext that the Parliament should await the outcome of the High Court challenge, twice rejected it. This Bill became one of those on which Governor-General Kerr, ostensibly on the advice of his appointed Prime Minister, Fraser, dissolved both Houses on the 11 November 1975.<sup>98</sup>

The *Seas and Submerged Lands Act 1973* completed the legislative design first promoted by Gorton and a small number of his supporters in 1970. The aim of the Bill was clearly expressed by Connor in the Second Reading Speech. He claimed to "introduce this bill . . . to remove any doubt about the exclusive right of the Commonwealth to sovereign control over the resources of the seabed off the coast of Australia and its territories from low water mark to the outer limits of the continental shelf."<sup>99</sup> Connor suggested that this legislation was long overdue, reflecting on first the lack of progress of the "Gorton Bill", and second that "as matters stand now the question of jurisdiction and ownership in offshore areas is in doubt."<sup>100</sup> It is clear from the States' response to the Gorton Bill and the Whitlam legislation that they disputed this latter point.

The strategy adopted by the Whitlam government was relatively clear. Connor announced that:

if there are parties - individuals or governments - who would

<sup>98</sup> E. G. Whitlam, *The Whitlam Government*: 258.

<sup>99</sup> Commonwealth Parliamentary Debates, (House of Representatives) 10 May 1973: 2005.

<sup>100</sup> *Ibid*: 2006.

dispute our right to take the course I now propose, let them challenge this legislation in the courts. We take this stand not in an attitude of provocation but in the confidence of doing what is clearly right and necessary.<sup>101</sup>

In spite of this assertion Connor claimed that "the Bill will not affect existing agreements between the Commonwealth and the States concerning off-shore petroleum however, or the legislation giving effect to those agreements which will continue to operate for the present time."<sup>102</sup> The States were not satisfied with this, believing that the Commonwealth's legislation broke the 1967 Petroleum Agreement.

The ALP's approach mirrored that which had been attempted by the ill-fated *Territorial Seas and Continental Shelf Bill* 1970. The *Seas and Submerged Lands Act* 1973 was similar in many respects to the *Continental Shelf and Territorial Seas Bill*, particularly in its assertion of Commonwealth sovereignty from low water mark. The major distinction between them was that the *Seas and Submerged Lands Act* 1973 included a mining code for minerals other than petroleum in areas which had been designated in earlier parts of the Act.<sup>103</sup>

A further element in the Whitlam government's strategy was to harness the nexus between the domestic issue of offshore jurisdiction and international law of the sea. The Whitlam government claimed that the *Seas and Submerged Lands Act* 1973 implemented the Convention on the Territorial Sea and Contiguous Zone and the Convention on the Continental Shelf. These international

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<sup>101</sup> Ibid.

<sup>102</sup> Ibid.: 2006.

<sup>103</sup> Commonwealth Parliamentary Debates, (House of Representatives) 10 May 1973: 2007

conventions were appended as schedules to the *Seas and Submerged Lands Act*. They were no doubt included to reinforce a constitutional anchor for legislation facilitated by the primacy of the Commonwealth in "external affairs", under Section 51 (xxix) of the Australian Constitution.

The State Premiers saw the *Seas and Submerged Lands Act* as a major threat to their powers and to "sovereignty", given that "the [*Seas and Submerged Lands*] legislation also ha[d] the effect of determining the distribution of *internal* sovereignty within the Australian federal system."<sup>104</sup> Reece, the Tasmanian Premier, still smarting from the conservation movement's attempts at Federal Government intervention to stop the flooding of Lake Pedder,<sup>105</sup> condemned the *Seas and Submerged Lands Act* as a major attack on "states rights".<sup>106</sup> He foreshadowed an immediate challenge to the validity of the legislation. In fact the Tasmanian and Queensland governments went further and "petitioned" the Queen for leave to appeal to the Privy Council to declare the act invalid as a usurpation of the state's sovereign rights."<sup>107</sup>

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<sup>104</sup> R. D. Lumb, *The Law of the Sea*, 52 (original emphasis).

<sup>105</sup> The damming of Lake Pedder has become a major cause *célébrée* in Australian environmental policy, and provided the first of a series of continuing environmental conflicts in the 1970s and 1980s in South-West Tasmania, including the intervention of the Hawke government to stop the proposed dam on the Franklin River.

<sup>106</sup> *Australian* 12 May 1973. Graham Maddox in his article "Federalism: or Government Frustrated?" *Australian Quarterly* 45, 3 (September 1973): 92-100, makes the point that the words "sovereign" or "sovereignty" in relation to States' rights were mentioned twelve times in this two-column newspaper article.

<sup>107</sup> H.V. Emy, *The Politics of Australian Democracy* (1st ed.) (Melbourne, Macmillan), 1973, 204-205. Emy claimed that this was "a significant constitutional victory for the

The Tasmanian and Queensland reference to the Judicial Committee of the Privy Council arose from the opinion given by Professor O'Connell in response to the "Gorton Bill". Tasmania and Queensland decided to act on the O'Connell opinion when it became clear that the Whitlam government would implement its promise to complete the task Gorton had begun.<sup>108</sup> The attempt to refer the matter to the Privy Council led the Whitlam government to introduce the *Privy Council (Appeals Abolition) Bill* into the Commonwealth parliament at the end of May 1973. This bill was introduced on the same day that the two States had, unbeknown to the Commonwealth, lodged petitions with the Privy Council registry seeking a reference of the *Seas and Submerged Lands Bill* to the Judicial Committee of the Privy Council.<sup>109</sup>

The introduction of the *Privy Council (Appeals Abolition) Bill* 1973 was made with the knowledge of the expected State challenge to the *Seas and Submerged Lands Act*. Whitlam considered "that we must avoid a situation in which both the Privy Council and the High Court would be called upon to consider the same question with possibly differing conclusions and that there should not be two streams of authority."<sup>110</sup>

Following correspondence between the British Prime Minister and Whitlam and between Whitlam and Governor-General Hasluck, it

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Commonwealth as it means that the States can now only appeal to the High Court to counter federal power".

<sup>108</sup> Queensland continued to be advised by O'Connell, (by then Chichele Professor of Public International Law at the University of Oxford), on offshore matters until his death in 1980.

<sup>109</sup> E. G. Whitlam, *The Whitlam Government*, (Ringwood: Penguin, 1985): 604-605.

<sup>110</sup> *Ibid.*, 604.

became clear that the British government would advise the Queen not to accept the petition from Tasmania and Queensland. Visiting Australia in early 1974, the Queen opened the Commonwealth parliament on 28th February 1974 when she:

inform[ed] Honourable Senators and Members that I have decided not to refer to the Privy Council petitions addressed to me by the State of Queensland and the State of Tasmania concerning rights to the seabed. My Australian and United Kingdom Ministers were agreed that the High Court of Australia is the appropriate tribunal to determine the issues raised in the petitions and, accordingly, that the petitions should not be referred to the Judicial Committee.<sup>111</sup>

The Tasmanian Solicitor-General, Mr Roger Jennings, who together with his Queensland counterpart had spent several weeks in England attempting to lodge the petition, had gained opinions from several legal authorities for the inevitable legal challenge in either the Privy Council or the High Court. Jennings' actions were supported by the then Tasmanian Attorney-General Mervyn Everett who also joined the two Solicitors-General in the presentation of the petition to the Privy Council. This infuriated the new Commonwealth Attorney-General, Lionel Murphy.<sup>112</sup> In one of the many ironies associated with the dynamics of Australian federalism and offshore matters Murphy's first constitutional case after his controversial appointment to the High Court was hearing the eventual challenge to the *Seas and Submerged Lands Act 1973*.

Some confusion has crept into the literature over Whitlam offshore legislation, probably due to the similarity in broad policy areas between the *Seas and Submerged Lands Act*, and the *Minerals (Submerged*

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<sup>111</sup> Opening address to Parliament 28 February 1974 quoted by Whitlam, *The Whitlam Government*, 607.

<sup>112</sup> R. Jennings, pers. comm. October 1989.

*Lands*) Bill (the controversial mining code which formed Part III of the original bill). Galligan, in his study of the Australian High Court, correctly describes the declaratory nature of the *Seas and Submerged Lands Act* as being modelled on the "abandoned" legislation promoted by then Prime Minister Gorton,<sup>113</sup> and then states that:

the Whitlam government revived the [Gorton] legislation and finally had it passed at the joint sitting, all the states challenged its constitutional validity. The states preferred the previous arrangement under which the ultimate constitutional issue was left untested, while they enjoyed a partnership with the commonwealth in administering offshore petroleum and sharing in its royalties.<sup>114</sup>

The convoluted parliamentary tactics surrounding the *Seas and Submerged Lands Bill* were to continue as the Whitlam government maintained its commitment to Commonwealth paramountcy in the territorial sea. Additional legislation, most notably the *Petroleum and Minerals Authority Bill* 1973 also aimed at increasing the Commonwealth's role in offshore resources policy. The Petroleum and Minerals Authority (PMA) was

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<sup>113</sup> B. Galligan, *Politics of the High Court*, 228.

<sup>114</sup> Ibid. While not disputing Galligan's analysis an error is present in this statement. In fact, as has been discussed earlier, the *Seas and Submerged Lands Act* (with the contentious Part III mining code removed) had been passed and given royal assent in December 1973. The *Seas and Submerged Lands Act* had, in addition, included "savings provisions" for existing State laws which did not claim sovereignty over the continental shelf (in effect most fisheries legislation was therefore "saved" from the provisions of the legislation). The remaining part of the original Bill, (what became the *Minerals (Submerged Lands) Bill*) had, as has been indicated, an equally tortuous path through the parliament becoming embroiled in the challenge by the States to the *Seas and Submerged Lands* legislation. The Senate refused to pass the *Minerals (Submerged Lands) Bill* on the grounds that the legislation should wait until the High Court had brought down its decision.

the main means by which the Government planned to increase Australian equity in mining . . . The functions of the PMA were to explore for and develop Australia's petroleum and mineral resources on Australia's behalf.<sup>115</sup>

In simple terms the PMA was to be a government utility which would enter into joint ventures with overseas corporations, or even small-scale Australian interests.

The PMA legislation was strongly attacked by the Liberal and National Parties who saw it as an attack on private enterprise and on the risk capital invested by private mining interests. Companies involved in offshore petroleum exploration were also critical of the proposed legislation. The Opposition stalled the legislation in the Senate following its introduction mid December 1973. An Opposition motion was quickly moved to adjourn debate on the Bill until February 1974. On resumption of debate in early April 1974, the *Petroleum and Minerals Authority Bill* was rejected by the Senate. However, the legislation was reintroduced into both the House and the Senate. The Senate again rejected the legislation on the 10th April. The Government then used it as part of its trigger for a double dissolution, granted on the 11th April 1974 by the Governor-General Sir Paul Hasluck. This was not the end of the matter as although:

the Bill to establish the Petroleum and Minerals Authority was one of the six passed at the Joint Sitting [held following the re-election of the Whitlam government] . . . It was challenged by two states primarily on the ground that it had not satisfied the three

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<sup>115</sup> E.G. Whitlam, *The Whitlam Government*: 250. Whitlam provides a succinct account of the Petroleum and Minerals Authority saga at 251-252.

months time interval imposed by section 57 [of the Constitution].<sup>116</sup>

The result of the *Petroleum and Minerals Authority* case<sup>117</sup> was that the legislation was ruled invalid on a technicality: the Senate's adjournment of the debate on the Bill did not, for a majority of justices, correspond to a rejection and therefore the Bill could not be submitted to the joint sitting.<sup>118</sup>

There is no doubt, of course, that the assertion of Commonwealth sovereignty encompassed in the *Seas and Submerged Lands Act* 1973 would have a major impact on Australian federalism, and particularly on the management of the offshore oil and gas resources. In spite of Connor's view that "for the present time" the 1967 intergovernmental agreement would continue to operate, the States were particularly concerned over the fate of the 1967 Petroleum Agreement. Following the lodging of each State's challenge to the validity of the *Seas and Submerged Lands Act*, Justice Menzies "ordered that, in lieu of each action being heard before the Full Court of the High Court, the question whether or not the Act is a valid Law be argued before the Full Court."<sup>119</sup> The full bench of the High Court heard the *Seas and*

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<sup>116</sup> H.V. Emy, *The Politics of Australian Democracy* (2nd ed): 230.

<sup>117</sup> *Victoria v. Commonwealth* (1975) 135 C.L.R. 337.

<sup>118</sup> The PMA case, and the implications of this case in terms of the joint sitting mechanism are discussed by B. Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia*, (St Lucia: University of Queensland Press, 1987): 226-228; and H.V. Emy, *The Politics of Australian Democracy* (2nd ed), 230-233.

<sup>119</sup> *New South Wales v. the Commonwealth* (1975) 135 C.L.R. 339. An interesting aside, and one which has a direct relationship to the fate of the Whitlam government, was that Justice Menzies, who had served the High Court from 1958, retired later in 1974. This resignation led to the controversial appointment of Senator Murphy to the High Court. Murphy was Attorney-General in the Whitlam government prior to his



*Submerged Lands* case in March and April 1975, bringing down its decision on December 17th 1975.<sup>120</sup> The challenge to the Seas and Submerged Lands Act was made by New South Wales on behalf of the other five States.

The High Court's decision is described succinctly by Professor Lumb.

The High Court upheld the provisions relating to sovereignty over the Territorial Sea (by a 5-2 majority) and (unanimously) the provisions relating to the continental shelf. Two strands of thought are to be found in the reasons of the majority judges, first that the external affairs power of the Commonwealth Constitution s.51[xxix] is a basis for the exercise of the legislative power of the Commonwealth in relation to the territorial sea, either on the basis that it deals with matters and areas geographically external to Australia or as implementing international conventions relating to such areas; and second, as related to the first proposition that the area of territorial waters, three miles in breadth, was not within the limits of the newly established states after federation. Consequently the legislation was not in derogation of any territorial or property rights held by the states or protected by the Constitution.<sup>121</sup>

On the question of jurisdiction offshore Chief Justice Barwick and Justices McTiernan, Mason and Jacobs, found that "the boundaries of

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elevation to the Bench and a keen supporter of the *Seas and Submerged Lands Act*. Murphy was appointed to the High Court on the 9th February 1975 resulting in the NSW Premier, Mr Lewis breaking convention and appointing an Independent, Mr Cleaver Bunton, rather than a ALP member to the casual vacancy created by Murphy's resignation. As has been indicated earlier Murphy's first case on taking up his appointment to the Court was the challenge to the *Seas and Submerged Lands* legislation.

<sup>120</sup> *NSW v the Commonwealth* (1975) 135 C.L.R. 339. Interestingly T. E. F. Hughes, former Attorney-General and acknowledged as the primary draftsman of the *Territorial Sea and Continental Shelf Bill* which was the catalyst for the Whitlam legislation, appeared for the Commonwealth.

<sup>121</sup> R.D. Lumb, *The Law of the Sea and Australian Offshore Areas*, 2nd ed. (St. Lucia: University of Queensland Press, 1978): 52.

the former Australian colonies ended at low-water mark and that they had no sovereign or proprietary rights in respect of the territorial sea or the superadjacent soil or superadjacent airspace."<sup>122</sup> Justices Gibbs and Stephen provided an opposing view in their judgements. Gibbs

conclude[d] that at the time of federation the bed of the territorial sea adjacent to each of the colonies was vested in the Crown and the territorial limits of the colony extended to the three mile limit. . . . Nothing that occurred on federation altered the pre-existing situation.<sup>123</sup>

Stephen argued that:

[h]aving stated my reasons for concluding that the British owned, as royal waste, the waters and beds of league sea surrounding the Australian continent when the Australian continent came to be given responsible government I pass now to the effect upon this position of the grant to these colonies of responsible government. In my view it resulted in league seas henceforth being owned by the crown in right of the respective littoral colonies, so that at federation there existed six Australian colonies in respect of each of which the crown in right of that colony owned its league seas.<sup>124</sup>

Justice Murphy's judgement considered the question of the relationship of the legislation to international agreements relating to the territorial sea. He found that "although the colonies exercised some jurisdiction over the territorial sea before federation and were becoming involved in international agreements, on federation the territorial sea attached as an attribute of international personality to the Commonwealth."<sup>125</sup>

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<sup>122</sup> *New South Wales v The Commonwealth* (1975) 135 C.L.R. 338.

<sup>123</sup> *Ibid.* 407.

<sup>124</sup> *Ibid.* 439.

<sup>125</sup> *Ibid.* 338.

In upholding the *Seas and Submerged Lands Act* 1973 the High Court resolved the questions of offshore jurisdiction, and using an appropriate metaphor, provided the "high tide" mark of Commonwealth offshore jurisdiction. The Gorton and Whitlam governments' proposals to assert, by declaratory legislation, jurisdiction from low water mark, raised considerable opposition from the States, who opposed any attempts to reduce their "sovereignty" offshore. The High Court provided a legal solution to the question of jurisdiction however the political fallout of the *Seas and Submerged Lands* case was to continue to be an important factor in Australian federalism and the offshore. Galligan comments that "[m]uch of the political heat was taken out of the Court's decision because it came down in December 1975 just after the new Fraser Liberal government had been sworn in."<sup>126</sup> The following Chapter examines the States' reaction to the High Court's decision and their involvement in devising an intergovernmental arrangement which entrenched federalism offshore.

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<sup>126</sup> B. Galligan, *Politics of the High Court* : 229.

## Chapter Four

### Commonwealth - State Relations and the Offshore

1975 - 1979:

#### Negotiating an Intergovernmental Agreement

The *Seas and Submerged Lands* case raised several problems for the newly elected Fraser government in its dealings with the States. It had, by default, achieved the answer to the question of jurisdiction offshore which had eluded the Gorton, McMahon and Whitlam governments. The government, not surprisingly, welcomed the ratification of this area of Commonwealth power, but the Deputy Prime Minister, Mr Anthony, assured the States that sensible arrangements would be made with them.<sup>1</sup> This arrangement was likely to be complex to allow for the Commonwealth's interests yet also account for State concerns. The solution to the dilemma posed by the *Seas and Submerged Lands* case was eventually resolved by the Fraser government's commitment to a co-operative new federalism,<sup>2</sup> a direct contrast with particular aspects of the federalism promoted by the Whitlam government<sup>3</sup> - to which

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<sup>1</sup> B. Galligan, *Politics of the High Court*, (St. Lucia: University of Queensland Press, 1987): 229. See also *Australian* 18 December 1975.

<sup>2</sup> C. Sharman, "The Commonwealth, the States and Federalism" in D. Woodward, A. Parkin, and J. Summers, (eds.) *Government, Politics and Power in Australia* (3rd ed.) (Melbourne: Longman Cheshire, 1985): 108. See also C. Saunders and K. Wiltshire, "Fraser's New Federalism 1975-1980: An Evaluation" *Australian Journal of Politics and History*, 26, 3 (1981): 355-371.

the *Seas and Submerged Lands Act* 1973 was part. Most attention has focused on the fiscal elements of Fraser's new federalism, particularly in the attempt to return certain taxation powers to the States.<sup>4</sup> The OCS, however, has had greater impact and longevity, on Australian politics than the ill-fated proposal for reform of taxation sharing.

### The Reaction to the *Seas and Submerged Lands* Case

Although the Fraser government's reaction to the *Seas and Submerged Lands* case became closely linked to the new federalism, the offshore was not originally seen by Fraser as integral to this set of proposals. Galligan has argued that the judicial decision in the *Seas and Submerged Lands* case provided the Fraser government with the possibility of "establish[ing] good faith with the states and [to] give some concrete substance to its new federalism rhetoric."<sup>5</sup> The Fraser government promoted the OCS as a response to a need to move away from the confrontation of the past and, in addition, provide clear substance to the new federalism by applying this framework to the "offshore problem". This view tends to downplay the significance of intergovernmental interaction and the States' ability to gain significant outcomes from the vague promises for "co-operation" and "consultation" offered them. An alternative perspective, therefore,

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<sup>3</sup> This was, perhaps confusingly, also known as new federalism. For a comparison of the Fraser and Whitlam "New Federalisms" see A. Peachment and G. S. Reid, "New Federalism in Australia" in A. Parkin, J. Summers and D. Woodward, *Government, Politics and Power in Australia: An Introductory Reader* (2nd ed.) (Melbourne: Longman Cheshire, 1980): 108 -126.

<sup>4</sup> R. Matthews, "Issues in Australian Federalism" *Economic Papers* 58 (April 1978): 1-14. A little known aspect of the new federalism was consultation with the States over the Commonwealth's ratification of treaties. This was also to impact on the offshore settlement, given the nexus between these issues and the deliberations at UNCLOS III

<sup>5</sup> B. Galligan, *Politics of the High Court*: 229.

emphasises the States' influence in developing the OCS. The incorporation of the offshore problem into the new federalism ensured that the States' played a central role the implementation of the OCS arrangements.

The *Seas and Submerged Lands* case provided the States with an early test of the Fraser government's commitment to its new federalism. Within three months of the almost co-incident High Court decision and the election of the Fraser government, the SCAG had met and "agreed to explore areas of co-operation in relation to the legal aspects of offshore matters."<sup>6</sup> Prior to this, the Commonwealth had circulated a paper setting out the "consequences" of the decision of the High Court. The SCAG paper stated that:

in reaching this conclusion, the Court for the first time decided two matters of far-reaching importance. ... The first is that the States end at low-water mark and not at the three mile limit. The second is that the power to legislate with respect to external affairs authorises the Commonwealth Parliament to pass laws controlling and dealing with matters and events which are geographically beyond Australia's low water mark.<sup>7</sup>

The *Seas and Submerged Lands* case had, therefore, considerable significance for the administration of a range of diverse activities in which the States were involved. These included the administration of petroleum activities, managing fisheries, and responsibility for prosecutions over crimes at sea. The Commonwealth proposed that three sub-committees of the SCAG should be established; (the "baseline", "seabed" and "offshore waters" committees)<sup>8</sup> which were

<sup>6</sup> R. Cullen, *Australian Federalism Offshore*, (1st ed): Intergovernmental Relations in Victoria Program (Melbourne: Melbourne University Law School, 1985): 63

<sup>7</sup> Paper prepared for the Meeting of Standing Committee of Attorneys-General, Hobart 5th March 1976. Archives Office of Tasmania SGD 40 4 (1435/19).

to report back to a further meeting of Attorneys-General. The Commonwealth recommended:

to the standing committee that problems affecting areas such as fishing, shipping and navigation, marine pollution, environment etc., should be dealt with in the first instance at meetings of the relevant State and Commonwealth Ministers. Their legal advisers [were] to report problems (if any) to the appropriate legal Committee who will in turn report to the Standing Committee.<sup>9</sup>

At this stage the Commonwealth made no commitments regarding potential solutions to the problems arising from the decision of the High Court in the *Seas and Submerged Lands* case.

The process which resulted in the OCS was established by this meeting. The respective ministerial councils would consider the impact of the problems raised by the High Court decision but the intergovernmental settlement was to remain firmly in the control of the Commonwealth and State legal officials mediated through the SCAG. The central place of the law officers was to provide a distinctive pattern to these negotiations and affect a number of issues within the ambit of the offshore problem. Of these issues, the question of the status of the extra-territorial jurisdiction of the States in relation to fisheries legislation was of considerable concern for all States.<sup>10</sup>

<sup>8</sup> The subcommittees had the following responsibilities;

Baseline Committee: To identify principles for determining (a) baselines for measuring Territorial Sea, (b) Closing lines for historic bays, (c) closing lines of pre-federation internal waters. Seabed committee: To exchange views on available legal alternatives in areas such as mining (petroleum and otherwise), miscellaneous Crown leases and licenses, marine parks, Sea Protection Works etc. Offshore Waters Committee: To examine operation and administration of laws beyond State limits. See Agenda for meeting of Standing Committee of Attorneys-General, Hobart 5th March 1976. Archives Office of Tasmania SGD 40 4 (1435/19).

<sup>9</sup> The Attorneys-General received the sub-committee reports in June 1976.

<sup>10</sup> Existing State fisheries legislation was, however, excluded, by specific savings

### The States, Intergovernmental Relations and Fisheries

Fisheries were, almost inevitably, to become a major element of any negotiations over the offshore. Chapter Two has argued that as Australian fisheries were dominated by inshore or coastal operations each State had a sizeable interest in administrative infrastructure and a long history in management of these resources. Each State gained important political resources from the establishment of complex regulatory arrangements giving strong links with State based fishing industry organisations. None of the States supported increasing the role for the Commonwealth, and articulated such views at the seventh meeting of the Australian Fisheries Council (AFC) held in October 1976. Not surprisingly, given the position of the States, this meeting "resolved to apply the doctrine of the New Federalism to fisheries."<sup>11</sup>

At the parallel meeting of the AFC's Standing Committee, the Commonwealth officers announced that the Minister for Primary Industry, Ian Sinclair, had a view that the Commonwealth would provide the legislative control, and the States the administration of fisheries. The State and Territory officials were strongly opposed to this proposal given that Sinclair had earlier intimated that Commonwealth's view was to give the States greater control over fisheries. In a speech to the Australian Fishing Industry Council (AFIC) in February 1976 - soon after taking office - Sinclair had stated "it is my intention to initiate discussions with State Ministers to ensure to the

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clauses, from the effects of the *Seas and Submerged Lands Act* 1973.

<sup>11</sup> A. J. Harrison, "The Commonwealth Governments Role in the Administration of Australian Fisheries", mimeo, Hobart, Dept. Political Science University of Tasmania (October 1988): 68-69.



maximum their departments will be responsible for administration of fisheries jurisdiction to the limit of Australian jurisdiction."<sup>12</sup>

The States' position in negotiations over fisheries was further strengthened by litigation in the High Court. Although State Premiers had criticised the *Seas and Submerged Lands* case as leading to increased Commonwealth control over State fisheries, the *Seas and Submerged Lands Act* 1973 had an extremely tenuous link with existing State fisheries legislation. As a result of legal action which challenged the validity of Western Australian State fisheries legislation on the basis of the outcome of the *Seas and Submerged Lands* case,<sup>13</sup> the High Court held "that there was no conflict between ... [the Western Australian] Act and the *Seas and Submerged Lands Act* 1973 (Cwth)."<sup>14</sup>

*Pearce v Florenca* arose from the apprehension of a fishermen taking undersized rock lobsters (illegal under the Western Australian fisheries legislation) within three miles of low water mark. At a hearing in a lower court in Western Australia the defendant claimed that the Western Australian *Fisheries Act* was made redundant by the decision by the High Court in the *Seas and Submerged Lands* case. The magistrate "took the view that, because under the Commonwealth [Seas and Submerged Lands] Act sovereignty over the territorial sea and thus over the place where the offences were committed was vested in the Commonwealth, the relevant provisions of the state Act no longer

<sup>12</sup> B. Chatterton, and L. Arnold, "Fisheries Management and the New Federalism" in D. Jaensch, (ed.) *The Politics of the New Federalism*, (Adelaide: APSA, 1977): 175.

<sup>13</sup> *Pearce v Florenca* (1976) 50 A.L.J.R. 670.

<sup>14</sup> R Cullen, *Australian Federalism Offshore* (2nd ed) Intergovernmental Relations in Victoria Program (Melbourne: Melbourne University Law School, 1988): 55

had any valid operation as to that place in the territorial sea and dismissed the charges, holding that there was no case to answer."<sup>15</sup>

An appeal against the magistrate's decision in the Western Australian Supreme Court led to the matter being referred to the High Court. The High Court held that the Western Australian *Fisheries Act* had an "extraterritorial" character, related to the fact that the States could make laws with an extraterritorial reach if they related to the peace, welfare and good government of the State.<sup>16</sup> The High Court, in reinforcing the savings clauses of the *Seas and Submerged Lands Act*, provided judicial reinforcement of the States' interest in fisheries, an important resource in their negotiations with the Commonwealth. Unlike the management of offshore oil and gas, which was uncontestedly within the control of the Commonwealth following the 1958 Convention of the Continental Shelf and the decision in the *Seas and Submerged Lands Act*, *Pearce v Florenca* upheld States' fisheries legislation within the three mile limit, and possibly outside this boundary, at a crucial period in intergovernmental interaction over the offshore.<sup>17</sup>

The reinforcement of State legislative power over fisheries, and the

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<sup>15</sup> *Pearce v. Florenca* (1976) 50 A.L.J.R. 670.

<sup>16</sup> The major issue involved the section 6 of the Seas and Submerged Lands Act which "declares and enacts" that sovereignty in respect to the territorial sea is vested in the Commonwealth, even though the act included a savings provision in section 16 which did not limit or exclude the operation of any law of a state in force at the date of commencement of the Act or coming into force after that date, except in so far as the law is expressed to vest or make exercisable any sovereign rights. Stephen J argued that "it appears to me to be clear beyond debate that neither that section 6 or any other provision of that Act gives rise to any inconsistency between its provisions and those of the Fisheries Act (WA)" *Pearce v. Florenca* (1976) 50 A.L.J.R. 675.

<sup>17</sup> M. Haward, "The Australian Offshore Constitutional Settlement", *Marine Policy* 13, 4 (October 1989): 334-348.

States' insistence that the Commonwealth stand by its proposal that they would retain the major proportion of fisheries management activity, contributed to the lengthy delay in gaining agreement over fisheries. An ongoing conflict related to the boundary between Commonwealth and State management, particularly in terms of licensing fishermen or vessels. As indicated in Chapter Two, conflict between the States and the Commonwealth had begun to emerge in the late 1960s when, during a period of expansion in the Australian fishing industry, the Commonwealth began issuing licences for various fisheries previously under sole State licensing and regulation. In some cases, such as in the fisheries of Bass Strait, fishermen who were precluded from gaining licences or endorsements from State authorities could gain Commonwealth licences. Although these Commonwealth licences could be viewed as operating outside the three mile limit, the extra-territorial character of State fisheries powers made the position less clear, particularly when the State enforced size limits or other controls which may not have applied to those fishermen with Commonwealth licences.

Given the practical problems arising from Commonwealth and State licences in the same fishery, it was not surprising that this issue was eventually the subject of litigation in the High Court. This action had the effect of narrowing the extent of unresolved questions concerning jurisdiction offshore. The definition and the extent of State jurisdiction in territorial waters, together with the issue of "closing lines" across bays or gulfs affecting the operation of Commonwealth and State fisheries licences in these waters, were raised in *Raptis'* case.<sup>18</sup> The Raptis fishing company had a Commonwealth but not a

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<sup>18</sup> *A Raptis and Sons v South Australia* (1977) 51 A.L.J.R. 637.

South Australian licence to fish for prawns in waters off South Australia. Catches were seized by South Australian fisheries officers as no State licence was held. The company then challenged the seizure of the catch on the basis that since the area in which they were fishing was Commonwealth and not State waters, there was, therefore, no need for a State licence. In addition the writ brought by the company sought a declaration on the areas in which Commonwealth licences could operate.

The South Australian government opposed the Commonwealth's "closing lines" - the baselines drawn around heavily indented coastlines - from which maritime boundaries are measured, arguing that the area at the heart of the challenge was in fact State waters. In effect South Australia claimed Investigator Strait as State waters by drawing a closing line from the mainland to Kangaroo Island. The case therefore raised the status and origin of "closing lines" and also the constitutional status of what were termed "historic bays".<sup>19</sup> The High Court rejected South Australia's claim, with "a majority . . . [finding] that the fish had been caught within waters that were neither within the territorial limits of the state nor within internal waters or the three mile territorial sea."<sup>20</sup> The High Court did find, from analysis of the Letters Patent establishing colonial boundaries, that Spencer Gulf and the Gulf of St. Vincent were historic waters and therefore to be considered "in effect inland waters within the State". These waters were, by definition, under State jurisdiction. The identification of "historic waters", identified from the colonial Letters Patent which

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<sup>19</sup> For a detailed discussion of *Raptis'* case see R. Cullen, *Australian Federalism Offshore*, (2nd ed.): 58 and J. Waugh *Australian Fisheries Law*, Intergovernmental Relations in Victoria Program (Melbourne: Melbourne University Law School, 1988).

<sup>20</sup> R. Cullen, *Australian Federalism Offshore*, (2nd ed.): 60.

included statements over the maritime domain covered by these instruments, was another important resource for South Australia and Tasmania in discussions with the Commonwealth over fisheries.

The conflict over fishing licences at the heart of the dispute in the prawn fishery had led South Australia to support arguments presented by Western Australia and Victoria at the meeting of the Australian Fisheries Council in October 1976. Western Australia had "stat[ed] the case for the dominance of State legislation and administrative control over State based ('isolated') fisheries."<sup>21</sup> This was seen as a suitable way of conforming with the "rationalisation of Commonwealth and State administration" proposed by Prime Minister Fraser's new federalism. The negotiations over fisheries were, none the less, inconclusive, at this stage being quickly swamped by broader questions emerging over the "seas and submerged lands matters".

#### **Intergovernmental Negotiations - The Ebb and Flow of "Seashore Federalism".**

In a letter dated 4th April 1977 Prime Minister Fraser assured the Premiers that he "would consult with the states on matters of principle touching seas and submerged lands policy". These matters were raised again at a Premiers' Conference on the 12th April 1977 at which Fraser reiterated the Commonwealth's concern over the offshore, and gave a promise to review Commonwealth policy in this area. Fraser undertook to forward any proposals from the Commonwealth to the Premiers prior to the next Premiers' Conference. Correspondence

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<sup>21</sup> B. Chatterton and L. Arnold, "Fisheries Management and the New Federalism": 175.

between the Prime Minister and individual Premiers followed, most directed at points raised in the Prime Minister's letter and supporting the convening of a Premiers' Conference to deal specifically with these matters.<sup>22</sup> The Prime Minister's replies to the State Premiers gave an assurance that the Commonwealth "would not initiate any negotiations of a substantive or policy nature regarding those discussions" which were already in train.<sup>23</sup>

One outcome of these discussions was that a special Premiers' Conference was held in October 1977 "to deal specifically with the offshore issue".<sup>24</sup> Prior to this conference Fraser, in a letter to the Victorian Premier, re-affirmed his government's position:

An essential theme of our federalism policy is that we must restructure our forms and institutions of government, and our attitudes of mind, to general co-operation and not conflict, and to partnership and not domination. The Commonwealth should not be using the High Court judgement on the Seas and Submerged Lands Act as a means of intruding into functions more properly the responsibility of the States. The Commonwealth's direct role should be confined to the minimum of areas in which, in the national interest, it is reasonable, rational and economic for the central government to have a role. Our approach is that we want to discuss with the states the options that are open.<sup>25</sup>

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<sup>22</sup> An example of this correspondence is the letter sent from the Tasmanian Premier to the Prime Minister on the 29th April "seeking clarification" of the Prime Ministers letter of the 4th April. Archives Office of Tasmania SGD 40 4 (1435/19).

<sup>23</sup> This Correspondence is summarised in Archives Office of Tasmania SGD 40 4 (1435/19).

<sup>24</sup> R. Cullen, *Australian Federalism Offshore*, (1st ed.): 64. It is interesting in the light of the intergovernmental negotiation over the implementation of the OCS packages, examined in more detail in Chapter Four, that Cullen implies there was only one issue that needed to be resolved at the Premiers' Conference.

<sup>25</sup> Letter from Fraser to Hamer 13 October 1977 Archives Office of Tasmania SGD 40 3 (1435/18).

The Premiers' Conference of the 21st October 1977 dealt with the challenge posed by the *Seas and Submerged Lands* case in a particularly innovative manner. The States wished to have control over territorial waters "returned" to them and as this involved consideration of a number of factors, Prime Minister Fraser was naturally cautious in his response.<sup>26</sup> Weller's study of the Fraser Prime Ministership highlights the multilateral negotiations which followed; negotiations labelled, appropriately, by Weller, the "ebb and flow of seashore federalism". At the October Premiers' Conference Fraser was asked about the level of his commitment to return the territorial sea to the States. This no doubt reflected the concern felt by the State Premiers that such a proposal could easily fall apart, or that Fraser would use the High Court decision as a lever if the "states niggled too much."<sup>27</sup> The Prime Minister replied:

[a]s to a firm commitment, whatever comes from here I have to take back to my own cabinet. However, Mr Anthony and Mr Lynch are here and I suppose we have a reasonable chance of getting something through cabinet.<sup>28</sup>

Following advice from the SCAG and the special offshore sub-committees of the Solicitors-General, the Premiers' Conference agreed to five resolutions which were to form the basis of what was (much later) to be called the Offshore Constitutional Settlement. The resolutions were:

1. *That* subject of the resolution hereunder with respect to offshore mining and fisheries, the territorial sea should be the responsibility of the states and that for this purpose the limits and

<sup>26</sup> P. Weller, *Malcolm Fraser PM: A Study in Prime Ministerial Power*, (Ringwood: Penguin, 1989): 296.

<sup>27</sup> Ibid: 293- 295. Weller had unrestricted access to the Fraser papers and to cabinet documents making this section of *Malcolm Fraser PM* an important source of material.

<sup>28</sup> Ibid: 296.

powers of each state should be extended to embrace the territorial sea adjacent to it. This would not affect the Commonwealth's international responsibilities.

2. *That*, in the case of offshore mining for petroleum and other minerals beyond the present state limits, there should be a joint Commonwealth/State authority or authorities, with the essential day-to-day administration being in the hands of the State concerned and to preserve the present arrangement for the sharing of royalties in the case of petroleum. The functions of these authorities and royalty arrangements in the case of other minerals are to be the subject of further examination.

3. *That* control of fisheries to be considered at a later Premiers' Conference. In the meantime the question is to be considered by the Australian Fisheries Council and the Standing Committee of Attorneys-General.

4. The Commonwealth's constitutional power with respect to navigation and shipping are acknowledged and no joint authority is contemplated. This is subject to the reservations made by the States in respect of certain vessels.

5. The Standing Committee of Attorneys-General should be asked to advise on the legal means of achieving these ends.<sup>29</sup>

The State and Commonwealth Solicitors-General, comprising the "special committee of the standing Committee of Attorney-General on offshore matters other than offences at sea" met in Perth on the 3rd and 4th November 1977. This meeting considered the various means by which the "limits or powers" of the States could be extended but also discussed the proposed joint authority for offshore oil and gas and the fisheries arrangements. Although the minutes of the meeting indicate that it was concerned "merely to identify possibilities rather than to attempt to argue for consensus"<sup>30</sup> a draft of the mechanisms available

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<sup>29</sup> Resolutions of Premiers' Conference 21/10/77, Report of the Special Committee to the Standing Committee of Attorneys-General 3/2/1978. Archives Office of Tasmania SGD 40 4 (1435/19).



to implement the Premiers' Conference resolutions regarding State "limits and powers" was prepared.

A number of means could be used to achieve the extension of the "limits" of the States. These included the use of several constitutional provisions; Section 128 - (the referenda provision), Section 123 - (alteration of state limits), or Section 51 (xxxviii) - (the "request" power). Other methods included the use of the *Imperial Colonial Boundaries Act 1895*, or enacting specific Commonwealth legislation or specific United Kingdom legislation. The extension of the "powers" of the States could be made through Sections 128 or 51 (xxxviii) of the constitution or through specific Commonwealth legislation.

These proposals were circulated to State and Commonwealth Solicitors-General, and discussed at a further meeting of the "special committee" in Melbourne on the 19th December 1977. The meeting of the special committee of Solicitors-General also briefly discussed "the desirability of having an agreement in writing between the Commonwealth and the states that would set out the basic understandings sought by the states in relation to the offshore area."<sup>31</sup> It also considered the operation of the proposed joint authorities, focusing on issues raised in a paper presented by Victoria. Fisheries matters had not been neglected and had been discussed at a meeting of the Standing Committee on Fisheries during the previous week.

The issue of a formal, written, intergovernmental agreement over the

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<sup>30</sup> Ibid.

<sup>31</sup> Correspondence from Murray (Queensland Parliamentary Counsel) to Jennings (Tasmanian Solicitor-General), 4 January 1978, Archives Office of Tasmania SGD 40 4 (1435/19).

offshore was to continue to be raised in correspondence, and at various meetings, between the members of the "special committee" and also at the SCAG. Queensland law officers prepared a draft of the basic provisions they considered necessary to be included in such an agreement, and in covering correspondence to other State officials provide an illuminating account of the States' position in intergovernmental negotiations to this point.

The expectation would be that such an agreement would impose a moral obligation, at the least, on the present government and future governments of the Commonwealth to observe in respect of the offshore area the division of powers provided by the Constitution. While the significance of an agreement between the governments fades somewhat if the Constitution were suitably amended to secure States' jurisdiction to the outer limit of the territorial sea the existence of a formal agreement between the governments would be highly relevant if steps short of constitutional amendment were taken to support States' jurisdiction in the off-shore area. Its existence may act as a sufficient obstacle to a future Commonwealth government reversing the steps so far taken.<sup>32</sup>

Notwithstanding the fact that discussion had centred on the form of a formal intergovernmental "treaty", the Tasmanian law officers advised the Tasmanian Attorney-General that following their meetings:

[n]o agreement has yet been reached by legal advisers as to the best means of implementing resolution 1 [extending the limits or powers of the states] of the Premiers' Conference. This issue too, which is fundamental, will be the subject of a report emanating from the legal advisers meeting on February 3rd 1978 and should, in the opinion of the Solicitor-General, be the subject of discussion between you and the Premier before you go to [the next meeting of the Standing Committee in] Wellington. Another document requiring political judgement is to be circulated amongst State advisers only sometime in January. Its purpose will be to strengthen what is likely to be the best solution found acceptable to

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<sup>32</sup> Ibid.

both the Commonwealth and the States. The Solicitor-General proposes to explain to you the nature and origin of this document and the role it might well play in an ultimate solution - when he meets you in early February.<sup>33</sup>

The next meeting of SCAG was scheduled for late February in Wellington, New Zealand.<sup>34</sup> The Commonwealth Attorney-General was concerned that this meeting may be an unsuitable forum in which to include agenda items dealing with submerged lands:

I have reservations about the appropriateness of including the Seas and Submerged lands item in the Agenda for the meeting of the Standing Committee to be held in Wellington. This is essentially an Australian political issue and it seems to me to be inappropriate that it should be discussed in New Zealand under the Chairmanship of the New Zealand Attorney-General.<sup>35</sup>

The Special Committee of Solicitors-General met again between the 1st and 3rd February 1978 prior to the Wellington meeting of SCAG. The law officers met with fisheries and mines officials to discuss possible arrangements for offshore petroleum and fisheries. Reports from the meeting indicated that "[a]lthough some progress was made . . . the question of new Federal arrangement with respect to mines and fisheries is not yet resolved".<sup>36</sup> The Solicitors-General resolved to meet again in Adelaide on the 8th March where a new Commonwealth

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<sup>33</sup> Correspondence from Tasmanian Crown Counsel to Hon. Brian Miller MLC (Tasmanian Attorney-General) 21st December 1977, Archives Office of Tasmania SGD 40 4 (1435/19).

<sup>34</sup> As has been indicated in Chapter Two this ministerial council includes the New Zealand and Papua New Guinea Attorneys-General.

<sup>35</sup> Correspondence from Senator Durack (Commonwealth Attorney-General) to Hon B Miller MLC (Tasmanian Attorney-General) 23rd December 1977. Archives Office of Tasmania SGD 40 4 (1435/19).

<sup>36</sup> Correspondence from Jennings, (Tasmanian Solicitor-General) to Hon Brian Miller MLC (Tasmanian Attorney-General) 9 February 1978, Archives Office of Tasmania SGD 40 4 (1435/19).

paper on fisheries was to be circulated and a report made of ongoing discussions regarding offshore mining. The extensive debate over the "seas matters" reportedly led the Commonwealth Solicitor-General to comment that "I must admit for me the charm of the subject matter is nearing extinction"<sup>37</sup> but this meeting did settle the final report to the Attorneys-General on the question of extending the "limits and powers" of the States.

Although the Commonwealth (and some State) Attorneys had believed that the offshore was better left as an "Australian matter", these issues were raised at SCAG by Victoria and Queensland. Little debate on these issues took place with the other States seeming happier to discuss such sensitive issues at later meetings. It was felt that given the nature of the "fine balance" achieved in the intergovernmental negotiations over the offshore, a special meeting of SCAG on the offshore should be called. The New Zealand and Papua New Guinea Attorneys-General indicated that they would not attend the next meeting of SCAG, resolved to be held on the 7th and 8th April 1978, in Melbourne.

In spite of the limited debate on the offshore at the Wellington meeting, this gathering was important as it was here that the Queensland Attorney-General, Lickiss, promoted the notion of a formal written agreement between the Commonwealth and the States over the offshore matters. The normal rotation of SCAG to New Zealand may have given Lickiss greater freedom to raise these issues; given the lack of any serious debate from other States on what was a major issue for all Australian participants. The Queensland government was also embroiled in a major conflict with the

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<sup>37</sup> Informal Record of Meeting of Solicitors-General Committee, Archives Office of Tasmania SGD 40 4 (1435/19).

Commonwealth over control of the Barrier Reef, and this may provide some explanation for Queensland's insistence that a formal agreement be struck. Lickiss announced that he:

would like to raise one matter in connection with this ["the seas matters"] - the form of the agreement between the Commonwealth and the governments of the States relating to sovereignty of the off-shore areas. Those of us who were at the Prime Minister and Premier's (sic.) Conference, were quite clear in our own minds as to what the clear intention was at that time, and since then, because of the lapse of time, question whether communication from that meeting has filtered accurately and adequately to various other Ministers who may have some role to play in relation to this, and to officers concerned with this who are assisting the governments who are able to bring to fruition the intention of the meeting. I would like to see an agreement drawn up between the Commonwealth and the States clearly setting out what was the real intention of the Premier's Conference and which is agreed to by the Prime Minister. I would like those guidelines to be printed so that those officers and Ministers who are participating in this exercise know precisely how far they can go, and how far they shouldn't go.<sup>38</sup>

The Attorneys-General agreed that the Solicitors General should examine the "Draft Commonwealth-State Agreement Relating to Sovereignty in Offshore Areas" prepared by Queensland. This move may well have been an example of "non-decision making"<sup>39</sup> to avoid

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<sup>38</sup> Transcript of Meeting of Standing Committee of Attorneys-General Wellington February 1978, Archives Office of Tasmania T 3 SGD 40 4 (1435/19). Lickiss' approach to the Premiers' Conference, referring to 'Prime Minister and Premier's Conferences' is interesting in the light of the argument he was advancing. The lack of formal meetings between State Premiers outside the Premiers' Conference - Loan Council meeting chaired by the Prime Minister is in direct contrast with Canadian practice. The new federalism initiative of 1990-1991 led to the States proposing a Council of the Australian Federation, a meeting of Heads of Government to discuss broader issues than federal financial relations. The Commonwealth has endorsed the creation of the Council of Australian Governments, which will provide an important adjunct to existing elements of executive federalism in Australia.

<sup>39</sup> P. Bachrach and M. Baratz, "Decisions and Non-Decisions: An Analytical

the multiplicity of problems in such an arrangement, including the Commonwealth lack of support for such an agreement.

The proposed draft intergovernmental agreement was considered by the committee of Solicitors-General, who provided a report to the Attorneys-General at the Melbourne meeting of the SCAG. The Solicitors-General indicated that the draft agreement posed problems in terms of the resolutions referred to the Attorneys-General from the October 1977 Premiers' Conference. The Solicitors-General considered that the Premiers' Conference resolutions were deliberately vague and ambiguous but that the benefits of the Queensland proposal did little to outweigh the advantages of a looser arrangement. As a result the Attorneys-General agreed that the Draft Agreement was "designed to hold the Commonwealth on its political promises [and] although [they] agreed to be a good proposal is not to be proceeded with at this stage."<sup>40</sup>

Several issues were not addressed in the Draft Agreement, with the law officers finding three areas which would make a formal agreement difficult. The first problem arose as "differing views were expressed" over whether the territorial sea was confined to three miles or could accommodate any future changes in its breadth. A second complication arose relating "to the scope of the power" which remains with the Commonwealth after the change in responsibilities *vis à vis* the Commonwealth and States over the offshore had been effected. A third issue concerned the "express reservation" of offshore mining and

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framework" *American Political Science Review*, 57 (1963); 632-642.

<sup>40</sup> Memoranda to Tasmanian Acting Solicitor-General 10 April 1978, Archives Office of Tasmania SGD 40 4 (1435/19).

fisheries" in the resolutions of the Premiers' Conference which would restrict the efficacy of a formal agreement over offshore sovereignty.<sup>41</sup>

Of more importance, and with greater consequence, was the Solicitors'-General advice to the Attorneys-General over the extension of "the limits and powers" of the States. This advice involved a detailed consideration of the constitutional and legal options available to implement the resolutions of the October 1977 Premiers' Conference which would be central to any settlement of the offshore problem. These options, Sections 128, 123 or 51 (xxxviii) of the constitution, legislation under the *Colonial Boundaries Act*, or specific United Kingdom legislation were put to the SCAG. Opinion at SCAG was divided between the use of Sections 128 and 51 (xxxviii) with most States favouring them as their first or second choices.<sup>42</sup>

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<sup>41</sup> Reports of the Solicitor-General on Seas Matters: Draft Commonwealth State Agreement Relating to Sovereignty in Offshore Area (sic) Archives Office of Tasmania SGD 40 4 (1435/19).

<sup>42</sup> The order of preferences were:

Commonwealth - S128, S51(38), S123, United Kingdom legislation., Colonial. Boundaries Act;

New South Wales - S128, S51(38), S123, Colonial. Boundaries Act, United Kingdom legislation;

Queensland - United Kingdom legislation, S51(38), S128, S123, Colonial Boundaries Act;

South Australia - "each way bet" between S51(38) and S128;

Tasmania - "equally divided" between S128 and S51(38);

Victoria - S51(38), S128, S123, United Kingdom Legislation, Colonial Boundaries Act;

Western Australia - S51(38), United Kingdom legislation, S128, S123, Colonial Boundaries Act.

Standing committee of Attorneys-General 7/8th April 1978, Archives Office of Tasmania SGD 40 4 (1435/19).

Each proposal had its drawbacks. A referendum formally altering the constitution to incorporate the resolutions was the most emphatic solution although the process involved did not guarantee achieving the desired outcome. A request to the British parliament to pass specific legislation was an option, although this also raised several problems in terms of Australia's legislative independence. As indicated in Chapter One the States could refer matters to the Commonwealth under the "reference" power (Section 51 xxxvii) of the constitution, although this was the reverse of what was desired by the States - the return of jurisdiction.<sup>43</sup> The "request" power (Section 51 xxxviii) seemed to provide a greater opportunity although it had never been used and there was some doubt over its purpose. The reluctance of the legal officers and Ministers to chance the offshore accommodation on a referendum is understandable.

The federal Parliamentary Labor Party maintained its support for the *Seas and Submerged Lands Act 1973* making it difficult to produce a bipartisan referendum on the offshore. Referendum history, reinforced by the events of the 1988 referendums, clearly shows that proposals which do not have the unanimous support of both major political parties and from all the States will fail. The option to amend formally the constitution was, therefore, of limited use to reduce intergovernmental tensions over the offshore. The political imperatives driving the offshore negotiations saw Section 51 (xxxviii)

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<sup>43</sup> Section 51 xxxvii (the reference power), although "expressly contemplat[ing] that the States may refer legislative powers to the Commonwealth" has been rarely used although Saunders believes that this appears to be related to political rather than legal concerns. C. Saunders, *Intergovernmental Arrangements: Legal and Constitutional Framework*, Papers on Federalism 14, Intergovernmental Relations in Victoria Program (Melbourne: Centre for Comparative Constitutional Studies: September, 1989): 6. See also K.W. Ryan & W.D. Hewitt, *The Australian Constitutional Convention*, Occasional Paper 6, (Canberra: CRFFR/ANU, 1977):11.



being promoted as a solution to the "offshore problem", simply because there was, in effect, no alternative.<sup>44</sup>

<sup>44</sup> Crommelin, in his analysis of the legal and constitutional issues surrounding offshore mining and petroleum, provides a detailed analysis of the drafting history of section 51 (xxxviii). M. Crommelin, *Offshore Mining and Petroleum : Legal and Constitutional Issues*, Papers on Federalism 3 Intergovernmental Relations in Victoria Program (Melbourne: Melbourne University Law School, 1981): 8-14. A detailed examination of a legal interpretation of the use of the reference powers is found in K. Booker, "Section 51(xxxviii) of the Constitution" *UNSW Law Journal* 4 (1981): 91 and R. D. Lumb, "Section 51, pl. (xxxviii) of the Commonwealth Constitution" *Australian Law Journal*, 55 (June 1981): 328-332. A broader interpretation of the placitum is undertaken by G. Winterton, "Section 51 (xxxviii) of the Constitution and Amendment of the "Covering Clauses" *UNSW Law Journal* 5 (1982): 327-330. Constitutional issues raised by the use of placitum xxxviii are discussed by R. Cullen, *Australian Federalism Offshore*, (2nd ed.) Intergovernmental Relations in Victoria Program (Melbourne: Melbourne University Law School, 1988). The provision was debated during both the first and second Constitutional Conventions during the 1890s. At the 1891 Convention Sir Samuel Griffiths drew "special attention" to the provision and commented that

we are aware . . . that there are many things now upon which the legislatures and governments of the several Australian colonies may agree, and upon which they may desire to see a law established, but we are obliged, if we want that law to be made, to go to the parliament of the United Kingdom, and ask them to be good enough to make the law for us. . . . It is not proposed by this provision to enable the parliament of the Commonwealth to interfere with the state legislatures; but only, when the state legislatures agree in requesting such legislation, to pass it, so that there shall be no longer any recourse to a parliament beyond our shores when once this constitution has been passed by the parliament of the United Kingdom.

*Official Record of the Debates of the National Australasian Convention* (Sydney 1891): 253. See also J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth*, (Sydney: Angus and Robertson, 1901): 651. At the 1898 session of the second Convention debate focussed on the meaning of the words "exercise within the Commonwealth" and the confusion arising from the reference in the placitum to powers exercised by the Federal Council of Australasia. Isaacs pointed out that this body was to be dissolved upon the assent of the *Constitution Act* and therefore queried its purpose. Notwithstanding Isaacs' argument only minor amendments were made to this provision. These amendments meant that the placitum was extended to include the words "any power" rather than Griffith's earlier proposal which was more limited, referring to "the power". M. Crommelin, *Offshore Mining and Petroleum*: 13.

SCAG accepted that Section 51 (xxxviii) or Section 128 were the appropriate mechanisms to extend the limits or powers of the States, in accordance with the resolutions of the 1977 Premiers' Conference. Although Section 51 (xxxviii) was first used as the constitutional anchor for the *Coastal Waters (State Powers) Act 1980*, the provision was also used to anchor the *Australia Acts 1986*. This legislation, like the offshore settlement, was predicated upon an agreement between the Commonwealth and the States as the trigger for the use of the request provision. Not surprisingly the enactment of the *Australia Acts 1986* provided considerable impetus for analysis of the request power.<sup>45</sup> Zines suggests, following a consideration of Section 51 (xxxviii) in relation to the *Australia Acts 1986*, that the provision "should be interpreted according to its terms and . . . to pass other legislation that was not within the competence of the Commonwealth or the States on 1 January 1901."<sup>46</sup>

The Victorian Attorney-General, Mr Haddon Storey, chairing the meeting of SCAG observed that:

I think the Constitution, section 51(38) comes out first, and . . . the United Kingdom legislation, closely afterwards. The question is now whether the Ministers would like to discuss those two

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<sup>45</sup> Given the increased interest in intergovernmental affairs in the 1970s and 80s greater interest was given to the interchange of legislative powers between the Commonwealth and States. Booker has noted that: "[c]onstitutional commentators largely ignored section 51 (xxxviii) after Quick and Garran concluded that it was difficult to see what power it conferred" "Section 51 (XXXVIII) of the Constitution" *U.N.S.W Law Journal* 4 (1981): 91. Lumb identified the range of interpretations given to the meaning of section 51 (xxxviii) "Section 51, pl. (xxxviii) of the Commonwealth Constitution" *Australian Law Journal*, 55 (June 1981): 328-332.

<sup>46</sup> L. Zines, *The High Court and the Constitution*, (2nd ed.) (Sydney: Butterworths, 1987): 273 -279.

alternatives to see whether in the light of the final discussion there is any final view.<sup>47</sup>

This discussion then centred on the viability of the alternative proposals. The lack of precedent in using Section 51 (xxxviii) was of some concern whereas Section 128 had its own particular, and well, appreciated, problems. Senator Durack, the Commonwealth Attorney-General supported the use of the request power, although he believed that Section 128 was:

from the legal point of view, ... a most excellent way of [extending the limits and powers of the States]. Of course, I am not anxious to have a referendum and from that point of view the use of section 51 (38) is most attractive and I personally have got a great deal of regard for it.<sup>48</sup>

The report of the Standing Committee's meeting in the *Commonwealth Record*<sup>49</sup> noted that the SCAG had "considered [a] legal framework for the new accord on offshore matters",<sup>50</sup> which was to be considered at the 1978 Premiers' Conference.

"Seas and Submerged Lands" comprised item three of the Premiers' Conference which opened on 22 June 1978. Within this item there were 12 subsidiary matters<sup>51</sup> listed for consideration. Only five

<sup>47</sup> Transcript of Meeting of the Standing Committee of Attorneys-General 7/8th April 1978, Archives Office of Tasmania SGD 40 4 (1435/19).

<sup>48</sup> Ibid.

<sup>49</sup> *Commonwealth Record* 3-9 April 1978, 320-321.

<sup>50</sup> Ibid: 320.

<sup>51</sup> These included Crimes at Sea, Port Type Facilities, Offshore Fisheries, Offshore Mining for Petroleum and Other Minerals, Offshore Non-Petroleum Royalties, Marine Pollution-Land Based, Shipping and Navigation, Marine Parks, Marine Pollution-Ship Sourced, Marine Pollution Through Dumping, Historic Shipwrecks and the Extension of Limits or Powers of the States.

(extension of limits or powers, crimes at sea, ports, offshore fisheries and offshore mining) were discussed at the conference. Prior to this meeting Commonwealth cabinet had met to consider issues arising from SCAG and from the extensive discussions with the States. As part of its deliberations the Commonwealth had sought several legal opinions over the use of Section 51 (xxxviii) and particularly how this mechanism would bind the Commonwealth. Of the "seven legal opinions sought five thought Section 51 (xxxviii) legislation could be unilaterally repealed by the commonwealth without the states being consulted."<sup>52</sup> Notwithstanding concern over the use of placitum xxxviii, the Department of Prime Minister and Cabinet suggested that cabinet not consider any approach that could contradict the resolutions agreed at the 1977 Premiers' Conference as this "might allow Premiers to reopen the issue."<sup>53</sup> Cabinet eventually endorsed the use of Section 51 (xxxviii), if agreed by the State premiers, to extend "the powers, not the boundaries of the states to the three mile limit."<sup>54</sup>

The bargaining and manoeuvring over the offshore continued at the 1978 Premiers' Conference. The States were wary of the unprecedented use of the request power, particularly as the possibility remained of the Commonwealth being able to unilaterally repeal the legislation and therefore overturn any intergovernmental settlement. As a result several Premiers urged the Commonwealth to use United Kingdom legislation to ensure the entrenchment of the scheme to extend State

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<sup>52</sup> P. Weller, *Malcolm Fraser: PM*, 297. For a contrary view of the possibility of repeal see M. Crommelin, *Offshore Mining and Petroleum: Constitutional Issues Intergovernmental Relations in Victoria Program*, Papers on Federalism No. 3, (Melbourne: University of Melbourne Law School, 1981).

<sup>53</sup> P. Weller, *Malcolm Fraser: PM*, 297-298.

<sup>54</sup> *Ibid*: 298.

limits and powers. Such views were encapsulated in the statement from New South Wales ALP Premier Wran:

[n]o one cares how we give effect to what are fundamental objectives we are agreed upon .... The only issue is how to do it in a way which will be legally binding and least subject to challenge in the courts.<sup>55</sup>

A resolution prepared by Victoria (which was the only State to agree with Prime Minister Fraser that an appeal to the British parliament should be the last resort)<sup>56</sup> was adopted, with minor amendments, by the Premiers. The Premiers' Conference resolution read:

That the powers of the States be extended to the territorial sea including the seabed, by the use of Section 51 (38) in such a manner as to confer upon the States the same powers as they possess over the land mass. That the use of Section 51 (38) be supported by the appropriate amendment of the Seas and Submerged Lands Act and the vesting of proprietary rights in the states in respect of the seabed of the territorial sea.<sup>57</sup>

At the 1978 Premiers' Conference Prime Minister Fraser remained closely involved in the negotiations. The following transcript shows the central role of the Prime Minister:

Mr. Fraser: Could I get agreement that in relation to shipping and navigation, marine parks, marine pollution-ship sourced, marine pollution through dumping, historic shipwrecks and royalties for offshore petroleum and offshore mining for minerals other than

<sup>55</sup> Ibid. This statement was to be later attacked by Whitlam as contributing to the unravelling of the ALP's achievements in resolving the question of jurisdiction.

<sup>56</sup> Ibid.

<sup>57</sup> Transcript of the Premiers Conference June 1978, 58-59. Summary prepared for the Solicitors-General Committee 11th July 1978, Archives Office of Tasmania SGD 40 4 (1435/19).

petroleum that we commit ourselves to meaningful discussion aimed at getting agreement? That will enable us to move to resolve all outstanding issues upon which progress has not been made. Could we have as an objective getting it all cleaned up in the next twelve months so that hopefully we can ratify everything at a subsequent Premiers' Conference and get it all put away?

Mr Hamer: Could I suggest that these matters be committed to the Standing Committee of Attorneys-General which can, as it has in the past, draw advice from appropriate sources?

Mr Fraser: That is the way in which it has been working.

Sir Charles Court: I take it that it is now a question of the Attorneys-General reaching agreement as to the form that this should take. We are anxious that no legislation on the question of shipping and navigation be introduced until agreement is reached.

Mr Fraser *The purpose is to get agreement. We will not go ahead unilaterally.*<sup>58</sup>

This extract indicates the desire of the Commonwealth to maintain progress, but also the important influence of the State Premiers in shaping a consensus over the offshore. Practical issues surrounding the use of the request power dictated a consensus approach but the more the States could engage the Commonwealth in negotiation the less likely the arrangement would unravel. The desire to resolve the outstanding matters prior to the 1979 Premiers' Conference is also clear, as is the merit of the approach so far taken by the Attorneys-General and the centrality of legal advisers in the process. Following the Premiers' Conference the Solicitors-Generals "special committee" considered the next stage to be "a full examination . . . by legal advisers drawing on the advice of the appropriate policy departments [which]

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<sup>58</sup> Transcript of the Premiers Conference June 1978, 79. (Emphasis added). It is interesting that Court and Hamer, crucial actors in gaining the Special Premiers' Conference the previous year, continued to maintain pressure on Fraser.

should identify the issues that need to be resolved as between the States and the Commonwealth."<sup>59</sup>

The State officials were aware that one outstanding issue was the effect of developments in customary international law of the sea, particularly the increasing support for coastal states to expand their territorial seas from three to twelve miles. These developments were viewed with interest by certain States who sought an increased role if Australia moved to an extended territorial sea. While domestic policy had had little effect on Australia's position at meetings of the United Nations Third Law of the Sea Conference (UNCLOS III), the States had observed that the Canadian provinces had representatives on their national delegation to these meetings and argued strongly for greater consultation over the deliberations at UNCLOS III.

#### UNCLOS III and Intergovernmental Relations Over the Offshore

The Australian States had long been concerned over the implications of the "external affairs power", and particularly the implications of the law of the sea since the *Seas and Submerged Lands* case. As part of their response to the Fraser new federalism, the States had pressed for greater involvement in treaty making and particularly to be represented on Australian delegations to meetings negotiating international treaties. In relation to the question of the offshore the States pressed for a representative on the delegation to the UNCLOS III meetings which had begun in 1974.

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<sup>59</sup> Summary of Premiers' Conference 11 July 1978, prepared for the Solicitors-General Committee 11th July 1978, Archives Office of Tasmania SGD 40 4 (1435/19).

The Fraser government's new federalism acknowledged the importance the States placed on such treaty negotiations and moved to co-opt a representative of the States to the Australian delegation to UNCLOS III. Tasmanian Solicitor-General Roger Jennings was appointed the first States' "advisor" on the Australia delegation (beginning with the the seventh session of the UNCLOS III conference held between March-May 1978). Jennings had been closely involved with the "ebb and flow" of offshore federalism; responsible for attempting to present the Tasmanian case to the Privy Council in 1973, appearing before the High Court in the *Seas and Submerged Lands* case as well as having a lengthy involvement in the special committees advising SCAG. His "primary functions were to advise the Delegation on those areas which are, or are likely to become, of special interest to the State Governments and inform State governments of these matters."<sup>60</sup>

The well-established linkages between Commonwealth and State officials over the "seas matters" were an important part of the process which resolved domestic intergovernmental issues over the offshore. An important adjunct to this process was the parallel international negotiations occurring at the sessions of UNCLOS III. As it became clear that deliberations at UNCLOS III supported an extended territorial sea, the spatial extent of the agreement over extended State powers and jurisdiction within the Australian territorial sea became critical. The Commonwealth maintained its view that these arrangements were based on a three mile "territorial sea" while the

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<sup>60</sup> Department of Foreign Affairs, *Third United Nations Conference on the Law of the Sea Seventh Session Geneva 28 March -19 May 1978 - Report of the Australian Delegation*, (Canberra: AGPS, 1978).



States wanted greater flexibility, and the possibility of the area under State control extending if Australia moved to extend its territorial sea to twelve miles.

International law and the reach of the external affairs power on domestic policy also impacted on the offshore in more specific ways. A long - running dispute between Queensland and the Commonwealth centred on the administration of fishing in the Torres Strait, which became an international maritime boundary with Papua New Guinea's independence in 1975. The Queensland government's negotiations, or intransigence, over the Torres Strait had a major influence on the attempts to ratify this treaty. Hugh Collins argues that as a result "the history of the Torres Strait Treaty is as much a study in Commonwealth-State diplomacy as bilateral negotiations between Australia and New Guinea".<sup>61</sup> He adds:

[t]he Torres Strait Treaty . . . stands as an example of a genuinely federal issue in Australia's external relations. Here was a matter of national policy in international affairs, yet neither Canberra nor Brisbane could act unilaterally to resolve it.<sup>62</sup>

Queensland's early refusal to compromise over what it saw as an example of "states rights" and the complexity of negotiating fishing arrangements between Queensland, the Commonwealth and Papua New Guinea, explains why the Torres Strait Treaty, signed in 1978, was not ratified by Australia until 1985.<sup>63</sup>

<sup>61</sup> H. Collins, "Federalism and Australia's External Relations" Inaugural Arthur Calwell Memorial Lecture, *Australian Outlook* 39, 2 (August 1985): 124.

<sup>62</sup> *Ibid.*

<sup>63</sup> M. Haward, "The Australian Offshore Constitutional Settlement" *Marine Policy* 13, 4 (October 1989). See also J.R.V. Prescott, *Australia's Maritime Boundaries*, Canberra Studies in World Affairs No.16, (Canberra: ANU, 1985).

The development of the Torres Strait Treaty provides a useful example of the influence of intergovernmental relations and the development of treaties and policies towards the management of marine resources. Prescott comments that "it was the need to produce complex legislation to govern fisheries [of Torres Strait] in Canberra, Port Moresby and Brisbane and to ensure that the legislation meshed perfectly that caused the long delay before ratification."<sup>64</sup>

The Queensland government's attitude to the Torres Strait illustrates the multi-faceted nature of the offshore "problem". In addition there were other more specific complications with the Torres Strait issue. Weller notes that the Fraser government found that:

[d]ealing with Queensland meant dealing with Joh [Bjelke-Petersen]. That meant relations were often unpredictable and never straight forward".<sup>65</sup>

As personal relations between Bjelke-Petersen and Fraser became strained Fraser used "intermediaries or emissaries" to negotiate a range of intergovernmental issues, including the Torres Strait Treaty, agreement over the Great Barrier Reef Marine Park and aboriginal policy. These emissaries were able to trade off various elements in each of the different policy areas to gain Queensland's support of the intergovernmental arrangements offshore. At the same time the Commonwealth was asserting its interests in the Great Barrier Reef it was preparing to hand back to Queensland control of aboriginal settlements.<sup>66</sup>

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<sup>64</sup> J.R.V. Prescott, *Australia's Maritime Boundaries*: 123.

<sup>65</sup> P. Weller, *Malcolm Fraser PM*: 278.

<sup>66</sup> K. Wiltshire, *Planning and Federalism*, (St Lucia: University of Queensland Press, 1986): 146.

In spite of the problems posed by Queensland, the search continued for an agreement over the offshore. Much had been accomplished between October 1977 and June 1978, due to the efforts of the committee work by the Commonwealth and State Solicitors-General. While all Premiers agreed with the principles behind the Fraser government's proposal, several issues still remained unresolved. It is interesting that the Commonwealth continued negotiating over these points rather than implementing the agreement over the use of the request power to extend States "powers or limits" in the territorial sea. While the "settlement" of the "offshore problem" hung in the balance - having survived two federal elections in 1977 and 1980 - the Commonwealth was not prepared to allow individual States to articulate ambit claims which may have disrupted the processes of entrenching the settlement or have Commonwealth interests negotiated away.

An example of such a barrier to an agreement was the Queensland government's claims over management of the Great Barrier Reef. The Queensland government had opposed the Whitlam government's legislation establishing the Great Barrier Reef Marine Park in 1975, maintaining that the area was the responsibility of the Queensland government. Although Premier Bjelke-Petersen was to continue to hold this position, Prime Minister Fraser made statements in the House of Representatives which indicated to Queensland that the Commonwealth's Great Barrier Reef Marine Park legislation would remain intact although the State would have a role in management.<sup>67</sup>

Final agreement over the management of the Great Barrier Reef

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<sup>67</sup> Fraser made statements on the Great Barrier Reef on the 22nd May 1979 in answering a question and in a Ministerial Statement of the 4th June 1979.

Marine Park was reached between the Commonwealth and Queensland in the middle of June 1979, just prior to the Premiers' Conference which concluded the offshore arrangement.

This agreement effectively ended fifteen years of tension over responsibilities for the Great Barrier Reef. The key to the settlement of the intergovernmental dispute over the management of the Great Barrier Reef became known as the "Emerald Agreement", so named as the crucial, final, meeting over the Reef held in the central Queensland town of Emerald. The agreement reconciled several contentious issues. Existing Commonwealth legislation would remain and the boundaries of the marine park established by this legislation would not be altered. A Ministerial Council would be established to address the key issues concerning the management of the marine park, with Queensland to have responsibility for the day-to-day running of the park, subject to guidelines established by the Great Barrier Reef Marine Park Authority. It was envisaged that the ministerial council would have oversight over the management of activities in the region.

The Emerald Agreement also established that Queensland legislation would be amended to complement the Commonwealth's marine park legislation, and following the offshore settlement agreed that Queensland would have control within the three mile limit. The final component of the agreement included the resolution to proclaim the first area of the Great Barrier Reef Marine Park - the Capricornia section. The Emerald Agreement resolved "the issue of control and management of the Great Barrier Reef *which ha[d] clouded the whole topic of present and proposed offshore constitutional*

*arrangements.*"<sup>68</sup>

The federal Opposition had remained concerned over the management of the Great Barrier Reef, and in particular the issue of oil drilling, attacking the lack of progress in asserting the Commonwealth's interests in the management of the reef. In defending his government's position the Prime Minister referred to the majority recommendations of the Royal Commission into exploratory and production drilling in Great Barrier Reef which had submitted its report in November 1974 (see Chapter Two). Prime Minister Fraser announced that "there should be no renewal of petroleum exploration permits in the region until the results of both short and longer term research are known."<sup>69</sup> Fraser also acknowledged that the Commonwealth had constitutional powers over the Great Barrier Reef (stemming from the *Seas and Submerged Lands* case) although he also informed parliament that "[d]iscussions with Queensland on the interrelated questions of the Premiers' Conference agreements on the extension of state powers to the territorial seas and the management of the Great Barrier Reef are at an advanced stage."<sup>70</sup>

The Emerald Agreement reflected the realities of federalism offshore and was achieved against a backdrop of the State's rights rhetoric of the Queensland Premier, who had continually opposed the involvement of the Commonwealth in what he regarded as a jewel in a solely Queensland crown. The successful establishment of the Great Barrier Reef Marine Park Ministerial Council and consultative committee

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<sup>68</sup> *Commonwealth Record* 25 June-1 July 1979: 831.

<sup>69</sup> *Commonwealth Parliamentary Debates* (House of Representatives) 4 /6/ 1979: 2839.

<sup>70</sup> *Ibid*: 2840.

resolved a major "loose end" of the offshore scheme, and ensured that Queensland would join the other States in agreeing to the offshore scheme, satisfying the unanimity condition for the use of Section 51 xxxviii.

The *contretemps* over the Great Barrier Reef was a microcosm of the broader processes of intergovernmental interaction over the offshore. Although Queensland had continued to maintain its position of "state rights" over the reef, its bargaining position and any potential veto of Commonwealth involvement, was gradually eroded. The *Seas and Submerged Lands* case was important, although the Commonwealth's influence was reinforced by bipartisan parliamentary support for the *Great Barrier Reef Marine Park Act 1975*. The signing of the *Torres Strait Treaty* in 1978 was a further limitation on Queensland's bargaining although, as discussed earlier, the ratification of this treaty had to take account of Queensland's concerns over fisheries management. Following the agreement over the offshore settlement, the listing of the Reef under the World Heritage convention in 1981<sup>71</sup> gave a further reinforcement to the Commonwealth's influence in the region and, in effect, entrenched its involvement as a result of the obligations arising from this convention.

While the flurry over the Emerald agreement was important in settling tensions over the Great Barrier Reef, the agreement with Queensland for joint management had broader implications. The high politics over the Great Barrier Reef culminating in the Emerald Agreement reflects the significance of a potential Queensland veto over the offshore scheme which could arise from Queensland's unhappiness over

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<sup>71</sup> The Convention for the World's Cultural and Natural Heritage UNESCO (1972).

arrangements governing the Great Barrier Reef. This is a good example of the bargaining which accompanied intergovernmental interaction. Queensland implemented various strategies in attempting to maximise its involvement offshore; Queensland officials and Ministers had attempted to establish a written agreement over the Commonwealth's role on the offshore. When this failed Queensland used the need for "minimum tolerable consensus" as leverage to maximise its involvement in the management of the Great Barrier Reef. It is possible that Queensland fought hard for something that the Fraser government was always going to give it, but the theatre of intergovernmental interaction was, as usual, directed at a State audience.

Queensland played a predictable hand; given that all States needed to pass legislation under the request provisions of Section 51 (xxxviii) they attempted to hold out for a particular deal on the Barrier Reef. Since there were other players involved in the game, Queensland could not win using this strategy and was subject to increased pressure from these other players. Eventually, as Weller indicates, Fraser's patience was wearing thin<sup>72</sup> and the pressure on Queensland to accept proposals for joint action (the Emerald Agreement) intensified. Part of this pressure related to the potential problems which would occur if the 1978 in principle agreement was not completed. As a result of the Emerald Agreement little stood in the way of intergovernmental settlement over the offshore. All that was needed was the Premiers' Conference to ratify the various agreements which became known as the Offshore Constitutional Settlement.

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<sup>72</sup>P. Weller, *Malcolm Fraser PM*: 301.

### The Intergovernmental Settlement

The Premiers Conference of June 1979 provided the final stage in the extensive intergovernmental and inter-institutional interaction over the in principle intergovernmental agreement concerning "seas and submerged lands matters". Apart from a last minute attempt by some States to push for an extension of State controlled waters if the Commonwealth extended its territorial sea to twelve miles, the meeting ratified the in principle position of the previous year. The State Premiers agreed to the compact which had been managed, in effect, by the Solicitors-General. The attempts by some of the States to maintain an open claim over the territorial sea illustrates the finely balanced nature of the offshore agreement. As Weller recounts:

Fraser stood firm at the 1979 Premiers' Conference. He pointed out to the Premiers that the federal government did not have to use section 51 (xxxviii). It could simply amend the Seas and Submerged Lands legislation; indeed this had been the earliest preferred tactic, but had changed because of states wishes. He would certainly not concede . . . [to continued pressure] on the issue of an approach to Britain which he declared 'offensive'.<sup>73</sup>

The Premiers' Conference ratified earlier decisions regarding the legislative design of the extension of "state limits or powers". The resulting agreement was given the title "the Offshore Constitutional Settlement", a curious name for an explicitly political device.<sup>74</sup> This arrangement was publicised as a major achievement in "co-operative federalism", and as showing the new federalism at work, although as is

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<sup>73</sup> P. Weller, *Malcolm Fraser PM*: 301.

<sup>74</sup> It appears the title of the agreement was chosen by Pat Brazil then Secretary of the Attorney-Generals department. Brazil was to also be responsible for the rather more controversial advice regarding the announcement of the proclamation of the State Titles Act in February 1983, action which took place during the federal election campaign of that year. P Brazil pers. comm. December 1989.



clear in the preceding discussion, the Commonwealth had considerable influence, and exercised a veto, in the negotiations leading to the agreement. Fraser's role in the settlement was acknowledged by the States' with Premier Wran stating that it was necessary to:

record the historic nature of the decision that has been made. We would want to compliment you Mr Prime Minister for the role you have played in what to my mind has been the best illustration of co-operative federalism in the last three years.<sup>75</sup>

Bjelke-Petersen, having lost the battle for sole control over the Great Barrier Reef, was to state later "I believe that it is a mark in State - Commonwealth relations that the Fraser - Anthony government agreed to return to the states control of our territorial seas - a step which was taken after numerous representations to the federal government and following challenges in the High Court."<sup>76</sup> Both Wran and Bjelke-Petersen saw the issue as centering on the States' control over the area from low water mark to three miles offshore. Arguably the emphasis on this issue left much of the implementation of the OCS undecided, making a second round of negotiations inevitable, a round at which the Commonwealth could continue to exercise influence in the three mile zone.<sup>77</sup>

Fraser, dragged into the maelstrom of "seashore federalism" by the State Premiers, particularly Sir Charles Court and Rupert (Dick) Hamer, was able to look back at the four years of sometimes tenuous negotiations with a sense of achievement.

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<sup>75</sup> P. Weller, *Malcolm Fraser PM*, 302.

<sup>76</sup> J. Bjelke-Petersen, "A Queensland view" in A. Patience and J. Scott, (eds.) *Australian Federalism Future Tense*, (Melbourne: Oxford University Press, 1983): 64.

<sup>77</sup> R. Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes*, (Sydney Federation Press, 1990): 130.

There have been arguments over the last ten, twelve or fourteen years that have been difficult for the Liberal Party and for the nation; offshore sovereignty and High Court cases which gave authority to the Commonwealth. It would have been possible to say to Dick Hamer in relation to Bass Strait, or to Sir Charles Court in relation to the North-West Shelf; 'Well, the Court's have given us sovereignty and we are going to exercise it totally. Our Department of National Development will move out into the states and you can get out of this area. It is of no concern to you!' This is precisely what the Labor Party has said that they will do. But we have set about in a painstaking way to negotiate a set of agreements on mining, drilling, fishing and the management of resources offshore. We have come to an agreement with all the states - Labor and Liberal - in a truly historic set of documents which have established agreement. We have done this without having to go to a referendum. We have done it without dispute. We have done it in a way which establishes a common sense relationship between the administration of the states and of the Commonwealth.<sup>78</sup>

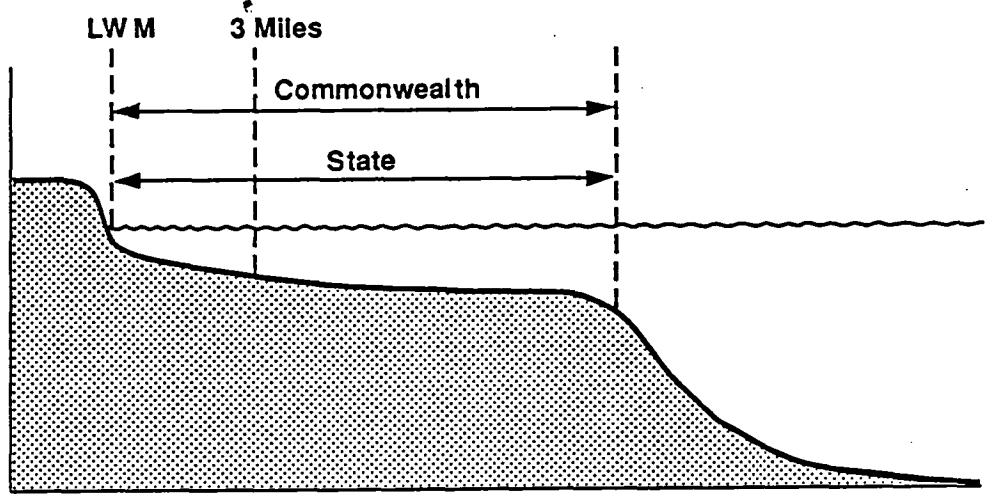
Given the debate raised by the use of placitum xxxviii as the constitutional support for the *Coastal Waters State Powers Act 1980* and the wide ranging discussions over the sidestepping of the High Court's decision in the *Seas and Submerged Lands* case the "settlement" of Australian offshore federalism involved as much controversy as the earlier intergovernmental battles over jurisdiction offshore. Several important differences, however, separated the OCS from the 1967 Agreement. The legislation implementing the OCS was not "mirror" but "complementary" legislation. The difference in terms (see Figure 3.1) expresses the fundamental distinction, yet at the same time provided a way that both the Commonwealth and the States could retain influence over their maritime interests.

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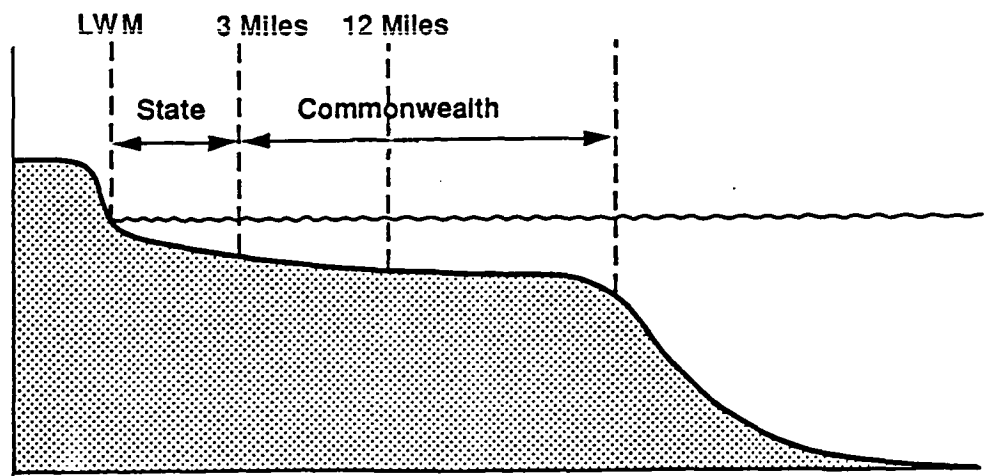
<sup>78</sup> M. Fraser, "The Commonwealth and the States" Address to the Victorian Liberal Speakers Group" 21 September 1981 in D. M. White and D. A. Kemp (eds.) *Malcolm Fraser On Australia* (Melbourne: Hill of Content, 1986): 156.

Figure 3.1  
Spatial Dimensions of Mirror and Complementary Legislation

MIRROR LEGISLATION



COMPLEMENTARY LEGISLATION



The 1967 agreement employed mirror legislation which is, as the description implies, identical Commonwealth and State legislation. The OCS was based on complementary legislation aimed at creating, by legislation, a boundary between Commonwealth and State jurisdiction that had been rejected by the High Court.<sup>79</sup> Complementary legislation aimed to return to the situation where the States were responsible within three miles of low water mark and the Commonwealth responsible for the areas outside the three mile limit. Such a settlement would not be sustainable unless there was unanimous support from the States.

A further consideration was that each State parliament had to pass 'request' legislation "which was a condition precedent to the use of s.51, pl.(xxxviii)."<sup>83</sup> This legislation was duly enacted and enabled the Commonwealth's legislation to be introduced into the House of Representatives in May 1980. The States had passed enabling legislation within ten months of the agreement being publicly announced. This speed, and the remarkable progress in developing such an innovative intergovernmental framework (in total twenty months from the resolutions passed by the Premiers' Conference in October 1977), is in marked contrast to the slow progress in intergovernmental negotiations over the the 1967 agreement and the abortive "Gorton Bill" of the early 1970s.

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<sup>79</sup> See R. Cullen, "Bass Strait Revenue Raising: A Case of One Government Too Many?" *Journal of Energy and Natural Resources Law*, 6 (1988): 213-247.

<sup>80</sup> Anon., "The Offshore Constitutional Settlement" - *Current Topics Australian Law Journal*, 54, 9 (September 1980): 519.

The Offshore Constitutional Settlement arose, according to the Commonwealth as a "reordering and readjustment of powers and responsibilities - as between the Commonwealth and States - was necessary to take account of the 1975 [*Seas and Submerged Lands* case] decision."<sup>81</sup> The OCS agreement was claimed to have:

marked the solution of a fundamental problem that had bedevilled Commonwealth-State relations and represents a major achievement of the the policy of co-operative federalism.<sup>82</sup>

Senator Durack, who as Attorney-General was responsible for the passage of the key OCS legislation on a potentially stormy voyage through parliament, believed that the settlement:

will ensure that the States will have adequate powers to deal with matters in the territorial sea. History, commonsense and the sheer practicalities make these matters for State administration, rather than central control, in the absence of overriding national or international considerations.<sup>83</sup>

The rationale for the organisation of the various packages comprising the OCS reflects the essence of the "new federalism" promoted by the Fraser government. Durack stated:

I have no doubt at all that historically, constitutionally and legally the settlement is in the authentic tradition of the Australian nation and the federation formed in 1901. . . . The offshore settlement provides the framework within which the

<sup>81</sup> Commonwealth of Australia Attorney-General's Department, "The Offshore Constitutional Settlement: A Milestone in Co-operative Federalism" *Offshore Australia*, (Canberra: AGPS, 1980): 4.

<sup>82</sup> *Ibid*: 1.

<sup>83</sup> Commonwealth of Australia Attorney-Generals Department, "The Offshore Constitutional Settlement: Selected Statements and Documents 1978-79" *Offshore Australia* (Canberra: AGPS, 1980): 14.

development and protection of these areas can go ahead. Workable arrangements are being established that will ensure effective and harmonious administration of the offshore areas and a fair sharing of the nation's offshore resources.<sup>84</sup>

There are two contending arguments over the introduction of the OCS. In one sense the OCS agreement could be expected given the conundrum facing the Fraser government discussed earlier in the Chapter. The Commonwealth faced a dilemma between retaining a significant (and hard won) constitutional victory and the States' desire to retain management of marine resources and to maintain influence in any developments. The situation was complicated by the fact that any increase in Commonwealth activity, say in fisheries management, needed the effective co-operation of personnel or infrastructure support from State authorities. It is neither unexpected nor surprising that, once the Fraser government indicated its willingness to discuss the offshore, the States would be assertive. This view presents the intergovernmental bargaining following the *Seas and Submerged Lands* case as deliberately avoiding a treaty along the lines of the 1967 Petroleum Agreement which would inevitably lead to further disputes. Negotiations aiming for a consensus over an appropriate sharing of responsibilities enable the States to exert considerable influence. Gaining Commonwealth support for extension of powers and limits of the States reflected the ability of the States to articulate their interests and resources at the bargaining table. The States' commitment to jurisdiction within the three mile limit dominated, and inevitably reordered federalism offshore.

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<sup>84</sup> P. Durack, "Statement on the Offshore Constitutional Settlement" *Commonwealth Record* (23-29th June 1980): 892.

An alternative view acknowledges that the Commonwealth retained considerable control of intergovernmental interaction over the offshore. While the States maintained a commitment to jurisdiction this commitment was countered by the range of legal constitutional and political resources available to the Commonwealth. There is no doubt that the agenda - although greatly influenced by the States' concerns and by the intervention by individual State politicians and officials - was controlled by the Commonwealth. The States achieved their main objective but the question remains over their influence. Did they gain what the Commonwealth was happy to give them? Did the concern over legislative and jurisdictional issues leave important questions surrounding the implementation of the "agreed arrangements" unanswered?

If the States' motives are relatively clearly defined, what then were the driving motives for the Commonwealth to conclude the agreement? A decade later it is questionable whether Durack's view that these arrangements were "harmonious" or would lead to "a fair share of resources" can be sustained. The Commonwealth was able to retain considerable influence which may have cut across the objectives of the OCS. The "high intergovernmental politics"<sup>85</sup> which had accompanied the offshore dispute throughout the 1970s meant that the Commonwealth's interests could not be ignored. The Commonwealth was given considerable room to manoeuvre during implementation of the OCS, which went to considerable lengths not to bind either party.

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<sup>85</sup> This type of interaction was emphasised by the pivotal role played by the Prime Minister Fraser. At crucial periods he was able to use his personal imprimatur to gain agreement from the States over contentious matters.

The States regarded the OCS agreement as safeguarding their interests in the Australian territorial sea. From this the States expected a major role in implementing the policy packages contained within the OCS. The implementation of a political and philosophical commitment to maintaining State involvement in marine resource policy making did not, however, necessarily reduce, in zero-sum fashion, the level of Commonwealth activity. As a result the framework established by the OCS maintained a complex matrix of Commonwealth and State legislation, giving rise to extensive overlap in administration and regulation.

The "federal" structure established by the OCS reflects the reality of the entrenchment of Commonwealth power by the High Court as much as the strength of the interests of the States. For all its complexity the OCS remains essentially an accommodation between assertive State governments, who had a range of resources, including a commitment from the Commonwealth to a reappraisal of the Commonwealth-State relations behind their negotiating strategies and a compliant Commonwealth who was prepared to agree to arrangements which were, in the main, "common sense". When the States introduced non-negotiable items (such as Queensland's attempt to maintain control of the Great Barrier Reef or arguments to extend State influence over the territorial sea if and when Australia extended its boundary from the three mile limit) the Commonwealth exercised its veto, buttressed by the *Seas and Submerged Lands* case and the concurrent negotiations over UNCLOS III.



Evaluating the States' impact on the negotiations which led to the OCS must account for the limited impact the States had in changing direction of policy concerning certain offshore resources. The agreement between the Commonwealth and the States took arrangements established by the 1967 Petroleum Agreement as read. Little attempt was made to re-open debate over royalty provisions of the offshore oil and gas regime,<sup>86</sup> given the concern to establish a "watertight" intergovernmental arrangement. Re-negotiating the royalty arrangements was politically unwise, and of little concern at the time to the majority of States without direct benefit from offshore oil and gas. In spite of this the OCS was established in a period where the Commonwealth was able to wield considerable formal power in this policy area. The *Australian Law Journal* made the pertinent observation that "[u]nforeseen problems can still arise, and the settlement should not be regarded as definitely marking the end of all negotiations between the Commonwealth and State governments concerning this area of offshore responsibilities."<sup>87</sup> The continued intergovernmental negotiation through the 1980s, discussed in the following chapter, directed at the implementation of the OCS packages, was directed at resolving these "unforeseen problems".

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<sup>86</sup> R. Cullen, "Bass Strait Revenue Raising: A Case of One Government Too Many?" *Journal of Energy and Natural Resources Law*, 6 (1988): 213-247.

<sup>87</sup> Anon. "The Offshore COnstitutional Settlement" *Current Topics Australian law Journal*, 54, 9 (September 1980): 519.

## **Chapter Five**

### **The Offshore Constitutional Settlement 1979 - 1990.**

#### **Establishing and Implementing the Agreement**

In June 1979 the Fraser government launched the OCS, purportedly concluding two decades of intense intergovernmental conflict with the States. The OCS was described as "a milestone in co-operative federalism", and a major achievement in new federalism. This chapter examines the implementation of the OCS, arguing that in entrenching responsibilities of both Commonwealth and State governments it was less successful in achieving a settlement of intergovernmental tensions. The publicity surrounding the OCS tended to gloss over the conflict between the Commonwealth and the States which had occurred in the earlier struggles over the offshore, a gloss which wore thin in the 1980s during the implementation of the various components of the OCS.<sup>1</sup>

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<sup>1</sup> The OCS comprised several elements or packages. Apart from the legislation underpinning the arrangement, additional packages were concerned with the development of management "regimes" for offshore oil and gas, fisheries and marine parks. The OCS also included packages that established intergovernmental frameworks for the administration of ship sourced pollution, crimes at sea and historic shipwrecks.

The lengthy period of time taken to negotiate and implement the OCS (the "agreed arrangements" of 1979 were only completed in 1990), contributed to a change in the character of the OCS. The original organic design gave way to a "sectoral" approach which can be identified in implementation of the OCS agreed arrangements.<sup>2</sup> The shift from an organic to a sectoral approach was influenced by several factors, including the election of the Hawke ALP government. The change of government was important although it is clear that the direction of intergovernmental relations over the offshore altered once the legislative base of the OCS had been proclaimed. Greater time was available to consider the operation of the OCS in different areas, or the specific arrangements necessary for its implementation. These factors encouraged the individual States to focus on particular issues which enhanced a sectoral focus. Queensland, for example, was clearly interested in the arrangements affecting the Great Barrier Reef, while Victoria was concerned with the administration of offshore oil and gas. Arrangements concerning historic shipwrecks had particular salience in Western Australia while Tasmania and South Australia focused on fisheries.

### **OCS Design and The Agreed Arrangements**

Following the Premiers' Conference of mid 1979 the Commonwealth Attorney-General's Department published a kit explaining the origins,

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<sup>2</sup> I introduced the concept of organic and sectoral approaches in "The Australian Offshore Constitutional Settlement". *Marine Policy* 14, 3, (October 1989): 334-348. Organic refers to the arrangement in which each component was established as an integral part of the larger settlement. Sectoral captures the sense in which the OCS is applied as a framework in differing, and discrete, policy areas with little concern with other areas. These concepts are elaborated in this chapter.

aims and mechanics of the OCS. This kit, entitled *Offshore Australia*, included what were known as the "agreed arrangements", forming the basis for the application of the OCS. The origins of the "agreed arrangements" can be traced back to the resolutions of the 1977 Premier's Conference as adjusted by the numerous meetings between Commonwealth and State Ministers and officials.

The agreed arrangements included the legislative basis of the agreement achieved through "complementary legislation". This complementary legislation was established by two overarching acts: The *Coastal Waters (State Powers) Act 1980* (Cwth), which extended the legislative power of the States to include the adjacent waters of territorial sea from low water mark to three miles offshore; and the *Coastal Waters (State Title) Act 1980* (Cwth) which vested title of the seabed of this area to the States. Amendments to the *Seas and Submerged Lands Act 1973* and concomitant amendments to fisheries, petroleum, navigation and historic shipwrecks legislation were necessary so that the "powers" and "titles" legislation<sup>3</sup> was not invalidated.

In economic terms the most significant element of the OCS related to the arrangements concerning *offshore petroleum*. Following the OCS parameters established that operations outside the three mile boundary

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<sup>3</sup> The legislation forming the OCS, in addition to the "powers" and "titles" Acts, included the *Crimes at Sea Act 1979*, *Seas and Submerged Lands Amendment Act 1980*, *Petroleum (Submerged Lands) Amendment Act 1980*, *Petroleum (Submerged Lands) (Royalty) Amendment Act 1980*, *Petroleum (Submerged Lands) (Registration Fees) Amendment Act 1980*, *Petroleum (Submerged Lands) (Exploration Permit Fees) Amendment Act 1980*, *Petroleum (Submerged Lands) (Production Licence Fees) Amendment Act 1980*, *Fisheries Amendment Act 1980*, *Navigation Amendment Act 1980* and the *Historic Shipwrecks Amendment Act 1980*.

would continue to be regulated by Commonwealth legislation. "Day-to-day" administration was to continue, on the basis of arrangements first established under the 1967 Petroleum Agreement, to be undertaken by the States. The existing pattern of royalty payments *vis. a vis.* the Commonwealth and the States was to be retained, a fact which was to lead to considerable friction between the Commonwealth and Victoria in the mid and late 1980s. A Joint Authority, comprising the Commonwealth and State Minister, was established for each State's adjacent area and was concerned with matters such as determining permit areas, granting of permits and licenses and determining conditions governing the level of work or expenditure. The agreed arrangements also included a regulatory regime for *offshore mining for minerals other than petroleum* based on complementary Commonwealth and State legislation embodying a common mining code.

Arrangements over *offshore fisheries* aimed to introduce a more flexible approach to fisheries administration. The OCS established that as far as possible a fishery would be managed by a single law, rather than the existing overlap between Commonwealth and State legislation. Reducing the complexity of fisheries management gained widespread support from the States, keen to promote proposals for "the dominance of State legislation and administration over State based fisheries."<sup>4</sup>

The fisheries arrangements included several joint authorities, consisting of the Commonwealth Minister and the appropriate State

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<sup>4</sup> B. Chatterton & L. Arnold "Fisheries Management and the New Federalism" in D. Jaensch (ed.) *The Politics of New Federalism*, (Adelaide: APSA, 1977): 175.

Ministers to regulate fisheries involving more than one State. Four joint authorities were included in the "agreed arrangements",<sup>5</sup> which noted that "in the event of disagreement within a fisheries joint authority, the views of the Commonwealth Minister will prevail."<sup>6</sup> The presence of the Commonwealth Minister's veto was not accepted by the States who generally avoided this type of arrangement in the implementation of the fisheries package. The emphasis on flexibility in the agreed arrangements implied that other joint authorities could be established. The agreed arrangements made no mention of the legislative basis of the joint authorities, although given the necessity for amendments to State fisheries legislation to incorporate complementary responsibilities arising from the OCS, either Commonwealth and State fisheries legislation could be used to anchor such arrangements.

The OCS also included arrangements to deal with *Historic Shipwrecks*, chiefly the amendment of the Commonwealth's *Historic Shipwrecks Act 1976* so that it would apply, or be applicable, to waters adjacent to a State or the Northern Territory with the consent of that State or Territory.<sup>7</sup> The arrangements over historic shipwrecks reflected the

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<sup>5</sup> These were a *South-Eastern Fisheries Joint Authority* (the Commonwealth and NSW, Victorian, Tasmanian and South Australian Ministers), a *Northern Australian Fisheries Joint Authority* (Commonwealth and Queensland and Northern Territory Ministers), a *Western Australian Fisheries Joint Authority* (Commonwealth and Western Australian Minister) and a *Northern Territory Fishery Joint Authority* (Commonwealth and Northern Territory Minister).

<sup>6</sup> "The Offshore Constitutional Settlement: A Milestone ...":10.

<sup>7</sup> Legal matters surrounding the discovery and exploitation of shipwrecks, particularly those off the Western Australian coast had emerged as a major issue in the 1970s. Claims arising out of the extent of "rights of discovery" over the wreck of the *Gilt Dragon* and for compensation in response to the passage of the Western Australian legislation which "purported to vest property in historic and aachaelogical sites" R. Cullen *Federalism In Action: The Australian and Canadian Offshore Disputes*

need for the OCS to incorporate the High Court's decision, (post *Seas and Submerged Lands* case) in *Robinson's* case.<sup>8</sup>

As a result of the Emerald Agreement, the *Great Barrier Reef Marine Park* was included as a package within the agreed arrangements. The *Great Barrier Reef Marine Park Act 1975* was to continue to apply to the whole of the Great Barrier Reef, as defined by that Act. Consultative arrangements were to be established between the Commonwealth and Queensland "for the management and preservation of the region which extends right into low water mark along the Queensland Coast and around Queensland islands in the area."<sup>9</sup> Apart from the Great Barrier Reef, the agreed arrangements established that *other marine parks* were to be either State or Commonwealth responsibility on the basis of the three mile boundary between State or Commonwealth legislation.

The agreed arrangements included several other ancillary packages including intergovernmental agreement regarding the prosecution of *crimes at sea*. Complementary Commonwealth - State legislation was to ensure that "an appropriate body of Australian criminal laws - either state or territory - is applicable to ships and to activities in offshore areas coming under Australian jurisdiction".<sup>10</sup> It was envisaged that

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(Sydney: Federation Press, 1990): 96.

<sup>8</sup> *Robinson v. Western Australian Museum* (1977) 138 CLR 283. *Robinson* led to a three-three split on the High Court with the case decided in favour of the plaintiff on the opinion of the Chief Justice (Sir Garfield Barwick). Barwick also found that the Western Australian legislation was beyond the legislative power of the State of Western Australia. R. Cullen, *Federalism in Action* : 96. Cullen gives a succinct account of what he describes as "Robinson's adventurous (and litigious) life".

<sup>9</sup> "The Offshore Constitutional Settlement: A Milestone ..." 11.

<sup>10</sup> *Ibid*: 12.

State law would apply for offences committed in the territorial sea and for offences committed on voyages between two ports in one State, or that began and ended at the same port. Commonwealth legislation would deal with other cases, but would apply the laws of the State to which the vessel was "linked", most usually the State in which it was registered. Such arrangements would not affect the application of specific Commonwealth legislation such as the *Customs Act*.<sup>11</sup> It was claimed that the agreement over crimes at sea "contained innovative provisions for the removal of proceedings from a court on one part of Australia to a court in another part of Australia where that would be expedient to avoid hardship . . . or to promote a speedy trial."<sup>12</sup>

The development of intergovernmental agreements concerned with *Shipping and Navigation* focused on arrangements concerning vessel survey and issue of certificates of seaworthiness, regulations governing the manning and control of ships' crew and the qualifications of those crew.<sup>13</sup> Under these arrangements the States would be responsible for all "trading vessels", except for those proceeding on interstate or an overseas voyage. The latter would remain the responsibility of the Commonwealth. Registration and regulation of commercial fishing boats, except those undertaking overseas voyages, would remain the responsibility of the States. Foreign vessels in Australian waters<sup>14</sup> would remain under Commonwealth regulations. An exemption to the category of "overseas voyage" was made to accommodate the particular case of Queensland registered fishing vessels operating in the

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid: 14.

<sup>13</sup> Ibid.

<sup>14</sup> This was to be more significant given the declaration of a two hundred (nautical) mile Australian Fishing Zone (AFZ) on the 1st of November 1979.



Torres Strait. These vessels would remain under Queensland control as a result of negotiations arising from the Torres Strait Treaty.

Inland waters were not affected by the OCS although NSW would retain control of the vessels operating on the River Murray upstream from the South Australian border. This continued existing practice, although it did not resolve other issues surrounding the "river question" - a major intergovernmental issue since federation.<sup>15</sup> Offshore oil-drilling vessels would remain under the control of the Commonwealth. The intergovernmental arrangements concerning shipping and navigation were negotiated at the same time that the Commonwealth and States established a *Uniform Shipping Laws Code*. This code was released on 28th December 1979<sup>16</sup> and provided uniform regulations over the construction, safety, survey and manning of commercial vessels, including fishing vessels.

The agreed arrangements on shipping and navigation were established within the parameters of international conventions regarding safety at sea, in particular the Safety of Life at Sea (SOLAS) convention.

Amendment of the *Navigation Act* (the *Navigation Amendment Act* 1979) implemented the 1974 International Convention for the

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<sup>15</sup> Even before federation the river question proved to be a large obstacle in the path to a federated Australia. Galligan notes that there are over 400 pages of debate on this topic in the Convention debates of the 1890s, see B. Galligan, "Judicial Review in the Australian Federal System: Its Origin and Function", *Federal Law Review* 10 (1979): 367-397. It was not until the 1980s that an intergovernmental body was established for the Murray-Darling basin. See A. Kellow "The Murray -Darling Basin " in B. Galligan, O Hughes & C. Walsh, (eds.) *Intergovernmental Relations and Public Policy*, (Sydney: Allen and Unwin , 1991): 129-145.

<sup>16</sup> *Commonwealth Gazette* 28 December 1979.

Prevention of Collisions at Sea. Following the pattern in other OCS packages this allowed "state law to apply these regulations to all ships in the territorial sea and provides the necessary Commonwealth law to apply the international regulations to ships outside the three mile limit."<sup>17</sup> As in other areas of the offshore, Australia's ratification and enactment of legislation giving effect to such conventions impacted on the responsibilities of both Commonwealth and State governments. The agreed arrangements announced that the Commonwealth was preparing a *Shipping Registration Bill* to replace the *Merchant Shipping Act 1894* under which Australian vessels were registered as British ships.<sup>18</sup>

The OCS updated existing co-operative intergovernmental arrangements controlling *ship sourced marine pollution*. These arrangements were established following Australia's ratification, in 1960, of the 1954 International Convention for the Prevention of Pollution of the Sea by Oil (the MARPOL Convention). This convention was given effect in Australia by Commonwealth legislation which applied to Australian Ships outside the territorial sea and by legislation which applied to *all ships* within the territorial sea. The Commonwealth and States agreed that these arrangements, which

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<sup>17</sup> "The Offshore Constitutional Settlement: A Milestone ...", 14.

<sup>18</sup> During the heated confrontation over the attempt to refer the *Seas and Submerged Lands Act* to the Privy Council, the Tasmanian Solicitor General had investigated the possibility that registration of vessels (including ocean racing and cruising yachts) as British ships could influence the reference to the Privy Council.

predated the decision in the *Seas and Submerged Lands* case, should be retained in the OCS framework.

### **The Agreed Arrangements and Commonwealth-State Relations**

The opportunity afforded the States by the Commonwealth's commitment to recognise their concerns encouraged the successful development of the agreed arrangements. The period was marked by Commonwealth and State collaboration where the sole critics of the agreed arrangements appeared to be the federal Opposition. The influence of the federal ALP's opposition was moderated by the support given the arrangements by ALP State Premiers Wran (New South Wales) and Lowe (Tasmania). The ALP-governed States found little would be gained by supporting the Federal ALP party platform, reflecting their earlier vehement opposition to the Whitlam government's legislation. The support given by Lowe and Wran, and involvement of officials from these States in the design of the OCS, led to some intra-party conflict, although criticism was most noted from individual members of the ALP who saw the Whitlam government's design being unravelled.<sup>19</sup>

The support from all States towards the agreed arrangements was not surprising. Each State had invested a considerable amount of time, effort and expense in drafting the arrangements which had emerged from a consensus from the many meetings of Solicitors-General.<sup>20</sup> At the margin however was the Commonwealth's possible fall-back of

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<sup>19</sup> See P. Keating's comments during the debate on the *Coastal Waters (State Powers/Titles)* legislation and Whitlam's comments in *The Whitlam Government*, (Ringwood: Penguin, 1985).

<sup>20</sup> P. Brazil, pers. comm. December 1989.

implementing the *Seas and Submerged Lands Act* 1973, while at the same time reinforcing and publicising the savings provisions in this legislation for policy areas which did not raise questions of sovereignty. The focus of the Solicitors-General was on achieving what were the immediate concerns of the States; their limits and powers in the territorial sea.<sup>21</sup> The high politics over the *Seas and Submerged Lands Act* was dissipated by the activities of the Solicitors-General and their staffs and the realisation by all concerned of the need to act upon a fortuitous combination of the coalition parties' commitment to the new federalism, the High Court decision in the *Seas and Submerged Lands* case and the result of the December 1975 election.

While the major focus was on the legislative design, and the arrangements for the major resource packages, the OCS was much more than arrangements for oil and gas or fisheries. The OCS packages concerned the development of administrative or legal frameworks to avoid the problems of inconsistency between State and Commonwealth jurisdiction or law. Grasping the opportunity of almost unprecedented intergovernmental "goodwill", the States attempted to reduce the level of Commonwealth overlap in different resource sectors.

Several factors were to ensure that the Commonwealth retained an important presence in the offshore. The "agreed arrangements" stated "[t]he . . . legislation and also the petroleum and fisheries arrangements . . . will be limited to a territorial sea of 3 miles, irrespective of whether Australia subsequently moves to a territorial sea of 12 miles."<sup>22</sup>

<sup>21</sup> See R. Cullen *Federalism In Action*.

<sup>22</sup> "The Offshore Constitutional Settlement: A Milestone ...": 7. In November 1990

Limiting the extent of the States' jurisdiction, together with the arrangements for joint authorities in particular packages, reinforced the Commonwealth's position offshore. A consequence of the development of the "agreed arrangements" was that the Commonwealth retained a major brokerage role in many policy areas. Co-operative federalism, promoted as an integral part of the OCS, understates the latent power of the Commonwealth in such a brokerage role. An example is found in the agreed arrangements over fisheries where it was stated that the Commonwealth *could agree* that a State be responsible for the administration of a particular fishery from low water mark to the edge of the 200 mile fishing zone, rather than giving a mandatory role for States in such an arrangement.

#### **Entrenching the Agreement: From Fraser to Hawke**

The legislation providing the foundation of the OCS, the *Coastal Waters (State Powers) Act 1980* and the *Coastal Waters (State Title) Act 1980*, were introduced into and passed by the Commonwealth parliament in May 1980. As discussed earlier, the settlement required complementary "powers" and "titles" legislation by the States and the Northern Territory to complete the legislative design. A model Bill for the complementary State legislation was included in the kit *Offshore Australia*. Although great efforts were made to ensure complementarity, each State was responsible for its own legislation

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Australia declared a 12 mile territorial sea. This provision in the OCS has meant that Australia is unlikely to undergo further conflict over the management of the extended territorial sea, unlike the USA where a similar extension of the territorial sea has raised a number of questions over federal-state relations. See, for example, R. Wilder, "Reassessing the 3- Mile State-Federal Boundary" in O.T Magoon, H. Converse, V. Tippie, L.T Tobin & D. Clark, (eds.) *Coastal Zone 91: The Proceedings of the Seventh Symposium on Coastal and Ocean Management* Vol 2, (New York: ASCE, 1991): 1356-1370.

with the result that variations in drafting and design are found between the States. Since complementary rather than mirror legislation was needed, such variations are of little practical importance although of some interest to constitutional lawyers.<sup>23</sup>

The *Coastal Waters (State Powers) Act 1980* (Cwth) was proclaimed with little fanfare in January 1982. The companion legislation, the *State Titles Act*, was proclaimed in more controversial circumstances, on the 14th February 1983. This date is significant given the ALP's recorded opposition to the OCS arrangements. Prime Minister Fraser gained a dissolution of the Commonwealth parliament on the 3rd February 1983 for an election on 5 March 1983.<sup>24</sup> The announcement of the intention to proclaim the *Coastal Waters State Title Act 1980* (Cwth) was gazetted the same day as the dissolution was announced. The gazettal and proclamation of the legislation, although controversial under Westminster conventions which govern the introduction of legislation during election periods, was undertaken by the Government on the advice of the senior officials in the Commonwealth Attorney-General's Department. It is clear that the

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<sup>23</sup> R. Cullen, *Australian Federalism Offshore*, Intergovernmental Relations in Victoria Program (Melbourne: Melbourne University Law School, 1988 ). It is possible of course that State parliamentary drafting attempted to claim much more than was intended by the model legislation prepared by the Solicitors-General.

<sup>24</sup> The events of the 3rd of February, when Hayden the ALP leader stepped down and was replaced by Hawke have entered Australian political folklore. Fraser's attempt to take on a divided ALP is acknowledged as a major spur to the early election; see P. Ayres, *Malcolm Fraser: A Biography* , (Melbourne, William Heineman Australia), 1987.

proclamation of the *State Titles Act*, which had been ready for several months after completing the necessary passage through the State parliaments in 1982, was made to reduce the chance of the OCS being "unravelling" if, as eventually occurred, the ALP won the March 1983 federal election.<sup>25</sup>

It is somewhat ironic that the Fraser government was defeated at the polls within three weeks of the offshore settlement being proclaimed. Like Whitlam before him Fraser found the shaping of offshore policy had foundered upon the rocks of an uncharted electoral defeat. The Fraser government lost the federal election of 5th March 1983 before the OCS, which the Prime Minister and his Cabinet had been promoting strongly as an exercise in Commonwealth - State co-operation within the new federalism, had been fully implemented. The OCS had hung in the balance before, most critically during the 1980 federal election, which may explain the haste with proclaiming the *Coastal Waters (State Titles) Act 1980* in February 1983. The ALP had bitterly opposed the OCS during debate in the Commonwealth parliament and had threatened to overturn the agreement and return to the sovereignty established by the High Court.<sup>26</sup> Cullen was to comment "it will be interesting to monitor the Settlement's progress over the next few years in the face of judicial review and the attitude of a federal government with an official policy of dismantling the settlement."<sup>27</sup>

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<sup>25</sup> P. Brazil, pers. comm. 5th December 1989. For a discussion of the impact of the *State Powers Act* see H. Nelson, "Legislative Outputs " in B. Galligan (ed.) *Comparative State Policies*, (Melbourne: Longman Cheshire, 1988): 20-39.

<sup>26</sup> Commonwealth Parliamentary Debates (House of Representatives) 5/5/ 1980.

<sup>27</sup> R. Cullen, *Australian Federalism Offshore*, 1st ed., 141.

Each of the States - with the most to lose in terms of the hard-won recognition of their roles as well as an acceptance of their involvement in offshore resources policy if the OCS was overturned - waited for the Hawke Government's response. A major question, as Herr and Davis have indicated, was whether the Hawke government would dismantle the OCS in its entirety or just the elements concerned with offshore petroleum and minerals.<sup>28</sup> On gaining government the Hawke government established a wide ranging internal review of the OCS arrangements, reinforced by a decision at the 1984 biennial ALP Conference which "endorsed the restoration of Commonwealth power and title over the three mile zone."<sup>29</sup> The result of the review was that although:

the Government is of the view that title over the territorial sea should not have been transferred from the Commonwealth by the previous government . . . *the arrangements which were entered into as part of the Offshore Constitutional Settlement have been working satisfactorily* and for this reason the government does not intend to take action at the present time to regain title to the territorial sea. Nor does the Government intend to alter the current powers legislation.<sup>30</sup>

The government considered that this approach would remain dependent on the "satisfactory operation" of the existing arrangements, foreshadowing Commonwealth intervention if a State or the Northern Territory failed to act "in a manner compatible with the national interest."<sup>31</sup>

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<sup>28</sup> R.A. Herr and B.W. Davis, "The Impact of UNCLOS III on Australian Federalism" *International Journal* XLI, 3, (1986), 689.

<sup>29</sup> *Ibid.*

<sup>30</sup> Commonwealth Parliamentary Debates (House of Representatives) 20/6/ 1986 (emphasis added).

<sup>31</sup> *Ibid.*



The Hawke government's response to the OCS supports the argument advanced in this study regarding the States' influence over intergovernmental relations offshore. The ALP's federal platform included a policy of enforcing Commonwealth jurisdiction offshore, and while in opposition Labor had strongly opposed the OCS, foreshadowing a return to the arrangements established under the *Seas and Submerged Lands Act 1973* on gaining government. The Hawke government's response recognised the problems in such a course. The significance of the States in offshore resources management and their strengths at the bargaining table resulting from these activities made Commonwealth unilateralism unattractive, if not impossible. The adoption of strategies of mutual accommodation in particular policy areas may overshadow the demands of partisan platforms.

Intergovernmental relations, particularly over the environment, dominated the first sixth months of the Hawke government's first term. The pre-election promise from the ALP to act to stop the flooding of the Franklin River in South West Tasmania utilising the "external affairs" power, led to the passage of the *World Heritage Properties Conservation Act 1983* (Cwlth). The *Franklin Dam* case<sup>32</sup> was viewed with some concern by the States as a harbinger of increased intervention by the Commonwealth.<sup>33</sup> The Hawke government's reaction to the OCS must therefore be measured against the contemporary climate of Commonwealth - State relations. The agreed

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<sup>32</sup> *Commonwealth v. Tasmania* (1983) 57 A.L.J.R. 450.

<sup>33</sup> B. Burke "Federalism After the Franklin" *Australian Quarterly* 56, 4 (December 1984): 4-10, and G. Samuels "The End of Federalism?" *Australian Quarterly* 56, 4 (December 1984) 11-19.

arrangements, after all, enabled the Commonwealth to achieve its objectives of maintaining the national interest and fulfilling Australia's international obligations under a range of general international treaties as well as specific maritime and marine environment conventions.

Notwithstanding the ALP's federal platform the reluctance to overturn the OCS arrangements reflected the fact that very little had, in fact, changed with the introduction of the OCS. In most cases the agreed arrangements formalised practices that had developed over forty years, or had targeted areas that had been problematic in the past. The lack of prescription in the agreed arrangements allowed a considerable degree of flexibility in the implementation of the OCS (a point recognised by State officials) and hence Commonwealth policy objectives in particular packages, for example the introduction of new taxation regimes for oil and gas production, were unlikely to be affected by the OCS structure.

Accepting the political costs involved in any dismantling of the OCS was another consideration in shaping the Hawke government's response to the OCS. Real costs would accrue to the Commonwealth if it had tried to overturn the OCS. Apart from questions of compensation for the States it is questionable whether the Commonwealth could have provided the management and regulation of the the range of activities taking place in offshore Australia. The interesting legal questions surrounding the possible revocation of the OCS aside, the question of compensation for the territory ceded to the States under the *State Titles* legislation,<sup>34</sup> would have led to a major

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<sup>34</sup> While this situation remains in the realm of speculation, the provisions of Section 123 of the Constitution (regarding the alteration of the limits of the States) would no doubt be the focus of State interests.

intergovernmental battle.

By 1983 the offshore had, in Galligan, Hughes and Walsh's terms, shifted from being seen as high intergovernmental politics, and by 1986 was firmly entrenched as a joint intergovernmental arrangement.<sup>35</sup> There were to be several skirmishes during the late 1980s as implementation of the OCS arrangements gathered pace. Given the major role played by Commonwealth officials in the negotiation over the OCS, and the Hawke government's "steady as she goes" approach to policy change there seems, on reflection, to have been little desire to overturn the OCS. It was the return to institutionalised arrangements over the offshore which was one of the achievements of the OCS. The return of responsibilities to the specific ministerial councils (and standing or technical committees) that enhanced the emergence of the sector approach to implementation.

#### **Intergovernmental Relations and the Implementation of the OCS - The Emergence of the Sectoral Approach**

The implementation of the agreed arrangements in each of the specific areas within the OCS was the final phase of Commonwealth - State relations over the offshore. The agreement of June 1979, was in Churchillian terms "not even the beginning of the end but . . . perhaps the end of the beginning."<sup>36</sup> The uncertainty over the Hawke government's attitude to the OCS and the declining significance of the offshore problem once the coastal waters legislation had been

<sup>35</sup> B. Galligan, O Hughes and C. Walsh "Introduction" in B. Galligan, O Hughes and C. Walsh (eds.) *Intergovernmental Relations and Public Policy* (Sydney: Allen and Unwin, 1991).

<sup>36</sup> W. S. Churchill "The Battle of Egypt Speech" Mansion House 10 November 1942 in *Bloomsbury Dictionary of Quotations*, (London: Bloomsbury, 1991).

proclaimed, contributed to the States' attempting subtle reshaping of the agreed arrangements within different sectors.

A sectoral approach may have been inevitable, but it is clear that the States' desire to maximise their position(s) in any regimes were important factors in shaping the pattern by which the OCS was implemented. This led to some complications. The time taken to achieve agreement over fisheries contrasted with the speedy adoption of the OCS arrangements in other sectors, with the fisheries package yet to be fully implemented in New South Wales.<sup>37</sup> Oil and gas arrangements, in contrast to fisheries, were soon completed.

#### (a) Offshore Oil and Gas

The offshore petroleum regime established under the OCS did little more than to update the arrangements of the earlier 1967 agreement between the Commonwealth and the States. This regime:

provides for Joint Authorities, comprising the Commonwealth Minister and the relevant State Minister, to decide the major issues under the legislation including the award, renewal, variation, suspension and cancellation of titles and conditions of titles. Day to day matters are handled by the State Ministers and their Departments.<sup>38</sup>

Administration of the regime involves consultation between

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<sup>37</sup> Meetings between the NSW and Commonwealth Governments over the classification of fisheries were held in 1990 and was at that time OCS arrangements were expected to be in place by the end of that year. G. Hamer pers. comm. July 1990. As yet NSW fisheries have yet to be fully to be integrated into the OCS. See also Industry Commission *Cost Recovery for Managing Fisheries*, Report No. 17 (Canberra: AGPS, 1992): 44.

<sup>38</sup> J. C. Starkey, "Australia's Offshore Petroleum Legal and Administrative Regime" *Maritime Studies*, 37 (November- December 1987), 25.

departmental officials from the Commonwealth and the States and Northern Territory through the the Standing Committees of the Australian Minerals and Energy Council (AMEC). In addition there is extensive consultation between administrators and industry.<sup>39</sup>

While administrative practice has generally been settled, the question of revenue sharing and royalties has emerged as a major source of (Victorian) dissatisfaction. A major element of intergovernmental negotiations leading to the 1967 Petroleum Agreement, concerned royalties - particularly the sharing of these royalties between the Commonwealth and the States. To recap, this agreement established an *ad valorem* royalty of 10 per cent well-head value shared 60/40 between the State and the Commonwealth. Little serious challenge was made to the existing royalty arrangements<sup>40</sup> in the negotiations over the OCS, no doubt because of the dubious legal and concomitantly weak political position of the States in such negotiations. The States' claims were weakened further by the Commonwealth's use of the excise power in the Constitution to increase its revenue share at the expense of the States.

The question of revenue sharing over offshore oil and gas is bound closely to intergovernmental relations over the offshore. Revenue sharing also involved the complexities of pricing of crude oil, and the calculation of well - head values. In negotiating the initial production licenses from Bass Strait fields the Commonwealth enacted a ten year pricing agreement with the oil exploration companies, an agreement

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<sup>39</sup> Ibid.

<sup>40</sup> See also R. Cullen, "Bass Strait Oil Revenue Raising: A Case of One Government Too Many" *Journal of Energy and Natural Resources Law*, 6,4 (1988): 245.

which expired in the mid 1970s. While this agreement provided a basis for calculating well-head revenues, (and in fact included a price to the oil companies which exceeded the going market rate) the world price for crude oil soon increased. The pricing agreement did not anticipate the "oil shocks" which followed the OPEC induced price increase of the early 1970s, which meant that by the mid 1970s the Australian price for indigenous crude was well below that paid for overseas crude. When the pricing agreement expired, both government and industry supported the introduction of import parity pricing for what was called "new oil" discovered after September 1975.<sup>41</sup>

While the royalty structure negotiated in the 1960s remained in place the Commonwealth was able to increase its share of revenues through changes to the pricing policy for crude oil and through the introduction of an excise or "crude oil levy" paid by the downstream refineries. This excise was to increase dramatically with the introduction of import parity pricing, giving the Commonwealth large windfall profits during the controversial "resources boom" of the late 1970s. Since the Australian constitution precludes the States from enacting excise duties the crude oil levy had the effect of giving the Commonwealth a massive increase in revenues from offshore production.<sup>42</sup> The introduction of parity pricing in September 1975 provided increased revenues to the companies while at the same time the return to Victoria, the only State directly affected by these

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<sup>41</sup> The evolution of oil pricing policy is discussed in M. Haward, *Institutions, Interest Groups and Marine Resources Policy*, Unpublished MA Thesis, Department of Political Science, (Hobart: University of Tasmania, 1986).

<sup>42</sup> This issue is examined in R. Wilkinson, *A Thirst for Burning: The Story of Australia's Oil Industry*, (Sydney, David Ell Press), 1983 and M Haward *Interest Groups and Marine Resources Policy*.

arrangements at the time, was effectively reduced by the Fraser government's excise arrangements. This resulted in:

[m]ost of the revenue levied by governments on Bass Strait oil production go[ing] to the Commonwealth, which collects about \$3.5 billion in royalties or excise under the world parity pricing arrangements and the Commonwealth *Petroleum (Submerged Lands) Act* while Victoria receives only \$170 million.<sup>43</sup>

In 1987-88 \$219 million was collected in royalties from Bass Strait and the North West Shelf. Excise on production from Bass Strait raised a further \$2.6 billion in this period.<sup>44</sup> The revenue sharing arrangements in the *Petroleum (Submerged lands) Act* led to \$143.9 million in royalties being paid to Victoria and \$4.8 million to Western Australia.<sup>45</sup> This had the effect of altering the 60:40 split in royalties in Victoria's favour in the early 1970s to a better than 95: 5 split in the Commonwealth's favour<sup>46</sup> without any formal alteration to the revenue sharing system established by the 1967 Petroleum Agreement.

In response to the reduction in "real" revenues by the imposition of the downstream excise the Victorian government attempted to increase its return by changing the license fees on production through pipelines within the State's jurisdiction. Hematite Petroleum, the BHP subsidiary which jointly held Bass Strait production licenses with ESSO, challenged the validity of the pipeline fee and sought the return

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<sup>43</sup> B. Galligan, A. Kellow and C. O'Faircheallaigh, "Minerals and Energy Policy" B. Galligan (ed.) *Comparative State Policies*, (Melbourne, Longman Cheshire) 1988: 222.

<sup>44</sup> Commonwealth of Australia, Department of Primary Industries and Energy, *Annual Report 1987-88* (Canberra: AGPS, 1988): 72.

<sup>45</sup> *Ibid.*

<sup>46</sup> R. Cullen, "Bass Strait Oil Revenue Raising: A Case of One Government Too Many", 232.

of \$19,992,920 in license fees paid by the company following the introduction of the scheme. The Victorian government's pipeline levy was overturned by the High Court in the *Pipelines* case,<sup>47</sup> which ruled in a four-two decision that:

notwithstanding that the pipeline operation fee payable by the plaintiffs was not calculated arithmetically by reference to quality or value of products transported, and the flow of such products could cease during the period for which a fee was payable . . . was accordingly a duty of excise. It resulted that s[ection] 2 of the *Pipelines (Fees) Act 1981* (Vic) was invalid.<sup>48</sup>

The attempts by the Victorian government to increase its share of offshore revenues through the pipeline fee reflects its frustration with the existing system of royalty/excise payments, although this system began to benefit all States as the Fraser government directed Commonwealth funds from the oil levy towards the States as part of the Commonwealth's financial assistance grants.

The fiscal elements of the Fraser government's new federalism meant that each of the States (rather than simply the designated authority) benefited from the revenues gained from the oil excise. Between 1981 and 1986 all States shared (to a limited extent) the revenues raised by the downstream excise through the introduction of the *States (Tax Sharing and Health Grants) Act 1981* (Cwth). As a result of this legislation revenues raised by the crude oil levy contributed to the "tax pool" from which general revenue grants were made to the States.<sup>49</sup>

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<sup>47</sup> *Hematite Petroleum v Victoria* (1983) A.L.J.R. 57 591.

<sup>48</sup> *Ibid.*

<sup>49</sup> R. Cullen, *Australian Federalism Offshore* (2nd ed) 1988. Oil and gas revenues comprised between 6 and 8 per cent of total Commonwealth revenues in the early 1980s, see R. Cullen, "Bass Strait Oil Revenue Raising: A Case of One Government Too Many" 232 and Review Committee into Australian Marine Science and Technology, *Oceans of Wealth?* (Canberra: AGPS, 1989).



The Hawke government amended the arrangements under this legislation to return to grants rather than a statutorily fixed percentage of global revenues.<sup>50</sup> Thus the Hawke government effectively reduced the level of payments from the tax pool to the States, emphasising the significant place of the broader parameters of federal financial relations in the oil and gas sector.

The Victorian government maintained its objections over the methods adopted to determine the level of royalties on Bass Strait production. In 1986 and 1987 the Commonwealth, in response to that objection, commissioned a study into the royalty and excise arrangements for production from the Bass Strait fields. In 1986 the Victorian Minister for Industry, Technology and Resources, Mr Fordham, wrote to the Bass Strait producers (Esso - BHP) indicating that the agreement reached in mid 1980 with the Commonwealth over the method of calculating the royalty for Bass Strait production had been terminated. The 1980 agreement involved the deduction of the crude oil levy from the "base product price" in arriving at the wellhead value. Fordham indicated that the arrangements would revert to the earlier "interim" arrangements, which would directly increase the amount of the royalty.<sup>51</sup>

The Commonwealth refused, as Cullen states, to accommodate the changes proposed by Victoria. Although the move would have increased revenues to both governments the crude oil levy would

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<sup>50</sup> R. Cullen, "Bass Strait Oil Revenue Raising: A Case of One Government Too Many", 232.

<sup>51</sup> Ibid 237. Cullen gives an succinct analysis of the complex arguments in the Fordham action.

have had to be adjusted reducing the Commonwealth's revenue.<sup>52</sup> Following the refusal of the Commonwealth to agree to any alteration to royalty payments, Minister Fordham registered an appeal in the Federal Court (under the *Administrative Decisions (Judicial Review) Act*) against the way in which the Commonwealth was calculating royalty payments. In November 1987 the Federal Court ruled in favour of the Commonwealth in two of the eleven grounds of appeal. The remaining grounds were deferred pending a foreshadowed High Court challenge mounted by Victoria under the *Tariff Act 1921*, the legislation which forms the basis for the petroleum excise. Although the case has lapsed, Cullen pointed out that:

this action has a political as well as a legal dimension. The action will be running whilst the States and the Commonwealth are negotiating on sharing arrangements with respect to . . . offshore fiscal regimes.<sup>53</sup>

The Hawke government's attempts to introduce these new regimes governing revenue sharing had an obvious impact on Commonwealth-State relations. The ALP's 1983 federal election platform included a commitment for the introduction of a Resource Rent Tax (RRT) to replace the existing complex mixture of royalties and excise. The RRT (sometimes described as a "profits tax") involves a tax rate that is levied once returns (profits) exceed a certain threshold. The States objected to such a tax as they felt that they would not gain any benefits from increased payments. In addition the States saw the RRT as a disincentive for further exploration administered by the States, the costs of which are reimbursed by the Commonwealth.

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<sup>52</sup> Ibid.

<sup>53</sup> Ibid 238.

The States were involved in broad discussions over the RRT although most interaction took place between the exploration companies and the Commonwealth Minister.<sup>54</sup> Given significant opposition the RRT was modified to apply only to "greenfields" projects, that is new oil and gas fields discovered after July 1st 1984. This excluded existing production areas in Bass Strait from the RRT. Debate over the RRT was lengthy and opposition from the Liberals and Australian Democrats in parliament led to the bill, initially introduced in May 1987, being withdrawn and resubmitted late in 1987. Assent to this amended legislation was announced in February 1988.

Negotiations between the Commonwealth and the States over a revenue sharing model continued. A possible model for a future royalty system may be the agreement reached between the Western Australian and Commonwealth governments over what has been termed the Resource Rent Royalty (RRR).<sup>55</sup> The RRR, developed for production from Barrow Island in north-western Western Australia, would replace the Commonwealth's crude oil excise and the State government's *ad valorem* royalty. The RRR, structured on a similar basis to the RRT, established a royalty of 40 per cent once a threshold had been passed. These revenues would be split 75/25 between the Commonwealth and the State governments. There has been little pressure to extend the RRR offshore, as the States argued that such arrangements reduced revenue.<sup>56</sup>

A review of revenue sharing arrangements for Bass Strait was

<sup>54</sup> See M. Haward, *Institutions, Interest Groups and Marine Resources Policy*.

<sup>55</sup> R. Cullen, *Australian Federalism Offshore* (2nd ed.), 35-36.

<sup>56</sup> J. Starkey, pers. comm. 6th December 1989.

undertaken by the department of Primary Industry and Energy in 1988 - 1989. Investigating revenue sharing under RRT was "academic" as at this stage there were no RRT revenues being generated. The RRT as the basis for offshore oil revenues was reintroduced in the 1990 Commonwealth budget.<sup>57</sup> The royalty review, and particularly the issue of revenue sharing from Bass Strait, was not surprisingly, of considerable interest to Victoria, who had been challenging the validity of the revenue sharing arrangements for five years. Victorian officials considered that the introduction of the RRT in the 1990 budget amounted to the Commonwealth abrogating commitments to the spirit and intent of the OCS.<sup>58</sup>

The Hawke government, while retaining the OCS framework for the administration of offshore oil and gas resources, was able to institute specific changes to the operation of this regime. The most significant change concerned the method of awarding exploration permits. The traditional method of awarding permits involved competing interests submitting their proposed exploration programmes to the State minister (the designated authority under administrative arrangements established by 1967 Petroleum Agreement and the OCS) with the "best" programme gaining the permit. The Hawke government argued that such a method of allocating permits could result in extensive drilling programmes being committed in areas that were of only marginal prospectivity. A system of "cash bidding", a competitive auction system, was proposed by the government in order to reduce the arbitrary nature of existing permit allocation and to reduce the capital wastage in unproductive programmes. The level of bid was seen as

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<sup>57</sup> *Financial Review* September 1990.

<sup>58</sup> J. Rimmer, Department of Premier and Cabinet, Victoria, pers. comm. 14 August 1992.

reflecting the company's view on the prospectivity of the permit, and be a more realistic forecast of the exploration programme.

Cash bidding was opposed by industry who regarded it as an "up front" financial impost. As a result of negotiations with industry the Commonwealth government agreed to modify the work programme system. This meant the addition of a "dry hole agreement" to the work programme system. This method ensured successful bids were aware "that . . . the first three years of the work programme bid must be completed [and] . . . which parts of the work programme are committed and which include a contingency element."<sup>59</sup> The introduction of "modified work programme bidding" involved considerable negotiation with industry and Victorian and Western Australian State governments, with the Commonwealth's original proposal of "cash bidding" eventually being restricted to permits in highly prospective areas in the Timor Sea.

Intergovernmental interaction was influenced by the presence of a strong and well resourced industry body the Australian Petroleum Exploration Association (APEA). APEA has maintained a close interest in the arrangements governing exploration and production of offshore oil and gas. In 1989, in response to the review into oil and gas administration undertaken by DPI&E, APEA identified several areas of concern to industry. In a letter to DPI&E the Executive Director of APEA criticised the arrangements arising from the separation of responsibility between joint authority and designated authority arguing that this had led to considerable delays in approving permit

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<sup>59</sup> J. C. Starkey, "Australia's Offshore Petroleum Legal and Administrative Regime", 27.

application or alterations to work programmes.<sup>60</sup> APEA maintained its opposition to increasing the costs of exploration through the imposition of cash bidding and RRT arrangements, views which were supported by some State governments.<sup>61</sup>

The issues raised by the question of the appropriate revenue - sharing arrangements have continued throughout the implementation of the oil and gas package. The primacy of these issues in interaction between Victoria and the Commonwealth is inversely proportional to the amount of time taken to discuss them during the negotiations which established the OCS. Although the oil and gas arrangements have attracted considerable academic attention,<sup>62</sup> Cullen has directed attention to the contrast between the "fairly amicable" negotiations between Victoria and the Fraser government during the design of the OCS and the conflicts in the mid to late 1980s.<sup>63</sup> It is more surprising that little was made of the revenue sharing issue during 1977-1979, for it was at this time that the introduction of world parity pricing and the crude oil levy was effectively (and rapidly) reducing the States' share of revenues.

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<sup>60</sup> Correspondence from K. Orchison to Petroleum Division DPI&E, 28 March 1990.

<sup>61</sup> Victoria and Western Australia and Tasmania were concerned that such proposals would reduce exploration activity. See M. Haward, *Institutions, Interest Groups and Marine Resources Policy*

<sup>62</sup> See, for example P. C. Reid, "Commonwealth-State Relations, Offshore Mining and Petroleum Legislation Recent Developments: A Historic Milestone or Millstone?" *Australian Mining and Petroleum Law Journal* 2, 2 (1980); R.A. Herr and B.W. Davis, "The Impact of UNCLOS III on Australian Federalism"; R. Cullen, "Bass Strait Oil Revenue Raising: A Case of One Government Too Many", and R. Cullen, *Federalism in Action: The Australian and Canadian Offshore Oil and Gas Disputes*, (Sydney: Federation Press, 1990).

<sup>63</sup> R. Cullen, "Bass Strait Oil Revenue Raising: A Case of One Government Too Many.

Cullen, in making the point that "it would appear from the public record that revenue sharing did not receive the status of a serious agenda item during [the OCS] negotiations",<sup>64</sup> poses the obvious question "why was this so?" Discussion in the previous chapter reinforces Cullen's view that little discussion took place over revenue sharing during the negotiation of the OCS. Cullen argues that the "preoccupation" with regaining jurisdiction led the State legal officers to pursue the legislative return "of what the High Court had said was never theirs; their coastal waters".<sup>65</sup> The preoccupation with the implementation of the political commitments made by Prime Minister Fraser is understandable. Several factors explain the lack of serious debate on revenue - sharing. The Solicitors-General had carriage of the issue but there were also clear signals given by the Prime Minister in his correspondence with the State Premiers on the limits to the negotiations over the seas and submerged land matters. The issue of oil and gas revenue sharing only directly affected Victoria. The other States, more concerned with other issues, were as one Commonwealth official has remarked, "along for the ride".<sup>66</sup>

The contrast between the intergovernmental arrangements over offshore petroleum and those in Australia and Atlantic Canadian is striking.<sup>67</sup> Although the jurisdictional disputes over offshore oil and gas followed a similar process, with judicial review favouring the

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<sup>64</sup> Ibid: 245.

<sup>65</sup> Ibid See also R Cullen *Federalism in Action: The Australian and Canadian Offshore Oil and Gas Disputes*, (Sydney: Federation Press, 1990): 104-132.

<sup>66</sup> J. Starkey pers comm. December 1989.

<sup>67</sup> See R. Cullen, *Federalism in Action: The Australian and Canadian Offshore Oil and Gas Disputes* and M. Haward "Intergovernmental Relations and Offshore Resources Policy in Australia and Canada", *Australian Canadian Studies*, 9 1,2 (1991): 35-51.

federal government, the outcomes of the political settlement are remarkably different. The provinces of Newfoundland and Nova Scotia have achieved considerable autonomy in regulatory control and revenue raising under the Atlantic and Nova Scotia Accords, arrangements denied the Australian States under the OCS. Cullen has described the Australian oil and gas arrangements as a national scheme administered by the States, while in Atlantic Canada the arrangements have a strong regional emphasis.<sup>68</sup> Although the oil and gas sector may have lacked a regional emphasis, devolution of responsibilities was greater in other sectors, and most clearly developed in relation to the Great Barrier Reef.

#### (b) The Great Barrier Reef

The OCS agreed arrangements reinforced the regime governing the administration of the Great Barrier Reef Marine Park established by the Whitlam government's *Great Barrier Reef Marine Park Act 1975*. This, not unexpectedly, raised considerable opposition from the Queensland government with Bjelke Petersen opposing the "duplic[ation] of a major activity of the state government and . . . [the involvement of the Commonwealth] . . . in a large percentage of Queensland's coastline".<sup>69</sup> The Great Barrier Reef Marine Park Authority (GBRMPA) established by the earlier Commonwealth legislation was responsible for the management of the Park. GBRMPA has seen almost all the Great Barrier Reef region included within the marine park since the first section of the Great Barrier Reef Marine Park - the "Capricornia Section" - was proclaimed in October 1979.

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<sup>68</sup> R. Cullen, *Federalism in Action: The Australian and Canadian Offshore oil and Gas Disputes*.

<sup>69</sup> J. Bjelke-Petersen, "Australian Federalism: A Queensland View" in A. Patience and J. Scott (eds.) *Australian Federalism: Future Tense*, (Melbourne: Oxford, 1983): 64.



Intergovernmental relations over the Great Barrier Reef prior to the OCS, detailed in preceding chapters, saw Queensland and successive Commonwealth governments involved in a paradigm case of Fritzler and Segal's "distintegrative conflict". The achievement of an accommodation between parties with what amounted to apparently mutually exclusive positions appeared difficult. - Russell Mathews commented that in the early 1970s:

relations between the Queensland government and the national government have been so bad as to seem on occasions that the state of Queensland and the Commonwealth are hostile foreign powers. The disagreements have been between state and National governments, not between Queensland and other states.<sup>70</sup>

The Emerald Agreement, and much deft manoeuvring by Commonwealth and State officials saw the first meeting of the Great Barrier Reef Ministerial Council being held in Brisbane on the 4th October 1979. This meeting led to co-operative intergovernmental management practices - known as "complementary management"<sup>71</sup> - being established. In contrast to the earlier political belligerence, administrative and bureaucratic co-operation over the management of the park has been the dominant mode of intergovernmental transaction. The success of complementary management in the Great Barrier Reef has meant that it has become a model for marine protected area management world wide.

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<sup>70</sup> R Mathews, "Foreward" in K. Wiltshire, *Administrative Federalism*, (St Lucia: University of Queensland press, 1977): ix.

<sup>71</sup> L.K. Kriwoken, "Great Barrier Reef Marine Park: Intergovernmental Relations" *Marine Policy* (September 1991): 349-362.

The successes in management reflect the good working relationships established by Commonwealth and State officials, and the staff of GBRMPA. This illustrates that much of Australian intergovernmental relations take place offstage, shaped by senior officials who share a concern and interest in similar policy issues. The achievement of what Fritzler and Segal would term "mutual accommodation" from what was clearly "disintegrative conflict" emphasises the importance of the linkages between officials at Commonwealth and State agencies in resolving disputes. Ensuring that these disputes do not recur is a major role for intergovernmental agencies such as Great Barrier Reef Marine Park Authority - part of their function in mediating or moderating Australian intergovernmental conflicts.

### **(c) Other Marine Parks**

The Great Barrier Reef Marine Park comprises 94.2 per cent of the total declared area of Australian marine parks and protected areas.<sup>72</sup> Various categories of Marine and Estuarine Protected Areas (MEPAs) are found under State jurisdiction, ranging from proclaimed marine parks or aquatic reserves to marine extensions to terrestrial National Parks.<sup>73</sup> Ivanovici provides a useful, although perhaps unnecessarily broad definition of a MEPA:

any area of intertidal or subtidal terrain, together with its superadjacent water and associated flora and fauna which has been reserved by legislation to protect part or all of the enclosed

<sup>72</sup> A. Ivanovici, "Marine and Estuarine Protected Areas (MEPAs): A National Perspective" *Maritime Studies* 32, (January- February 1987): 11. See also L.K. Kriwoken and M. Haward, "Marine and Estuarine Protected Areas in Tasmania, Australia: The Complexities of Policy Development", *Ocean and Shoreline Management* (1991): 143-163.

<sup>73</sup> A. Ivanovici, "Marine and Estuarine Protected Areas (MEPAs): A National Perspective": 13.

environment for conservation, scientific, educational and/or recreational purposes.<sup>74</sup>

There are some problems with this definition in terms of marine protected areas; a range of areas can be regarded as "protected" as long as they are reserved under legislation whether or not any restrictions are placed on exploiting the resources in the area.<sup>75</sup> The definition does, however, emphasise the number of potential MEPAs under State jurisdiction. Although the total area is particularly small, all States have declared MEPAs of one kind or other. These range from areas reserved and protected from any activities to multiple-use marine parks. The limited co-ordination of MEPAs policy indicates the real problems of implementing, enforcing or ensuring compliance with measures taken at ministerial council meetings. The Council of Nature Conservation Ministers (CONCOM) - now amalgamated with the Australian and New Zealand Environment Council (ANZEC) - had developed extensive criteria for the protection of marine environments and established agreed guidelines for the implementation of MEPAs throughout Australia. These guidelines were developed from criteria adopted by the International Union for the Conservation of Nature and Natural Resources (IUCN), a major international environmental organisation, and endorsed by all State Ministers, yet the States have not moved to implement these criteria in planning or managing MEPAs. Announcements made by the Prime Minister and the Commonwealth Minister for the Environment in 1990 and 1991 have meant that the development of an integrated system of marine protected areas formed an integral part of the

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<sup>74</sup> Ibid., 11.

<sup>75</sup> G Edgar, University of Melbourne, pers. comm. August 1989.

Commonwealth's Ocean Rescue 2000 initiative. Ocean Rescue 2000 involves GBRMPA and the Commonwealth's Australian National Parks and Wildlife Service (ANPWS), in conjunction with the States, implementing an integrated approach to marine protected areas.

Ocean Rescue 2000 arose from criticism of the piecemeal approach of policy towards marine protected areas and the lack of ecological criteria used in the development of State MEPAs.<sup>76</sup> The development of State marine parks and reserves has been seen as a response to increased public concern over the maritime domain with little desire to develop an integrated system of reserves. The uncertainty over the OCS had been used in specific cases (in particular Tasmania) to limit the introduction of a State policy towards MEPAs, although the claims of jurisdictional uncertainty was used to justify what was in effect "non-decision making".<sup>77</sup> Although the OCS arrangements has allowed for joint Commonwealth - State management of MEPAs, all reserves, with the exception of Ningaloo Marine Park in Western Australia have been established under either Commonwealth or State legislation.<sup>78</sup>

The lack of progress towards joint managment can be explained first by a lack of suitable areas, but more importantly the reluctance of the States to enter into joint arrangements with the Commonwealth

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<sup>76</sup> L.K. Kriwoken, "Great Barrier Reef Marine Park: Intergovernmental Relations".

<sup>77</sup> See L.Kriwoken and M. Haward "Marine and Estuarine Protected Areas in Tasmania, Australia: The Complexities of Policy Development".

<sup>78</sup> It is important to note the significance of non-government groups such as the Fund for Animals and the Australian Underwater Federation in the making of MEPA policy. The latter group, its constituent bodies and individual dive clubs have been responsible for the "establishment" of voluntary marine reserves in many areas off the Australian Coast See M Haward "Australian Marine Conservation Policy: A Framework For Analysis" *Proceedings ECOPOLITICS II Conference* (Hobart, Centre for Environmental Studies, University of Tasmania, 1987).

which reduces the level of discretion afforded them. While the Great Barrier Reef Marine Park illustrates the opportunities afforded by what has been termed "complementary management" and the justified claims for the success of GBRMPA, the Ningaloo case illustrates some of the problems that arise when joint Commonwealth - State management is proposed. The experience in the Ningaloo Reef Marine Park shows that intergovernmental tensions in this particular sector can arise from a lack of communication and consultation between management agencies at different levels of government.

Ningaloo Reef is located off the Western Australian coast in the vicinity of North-West Cape. It is claimed to be a unique reef system as "unlike the Great Barrier Reef and other Reefs in the North Coast of Australia it is not separated by a wide expanse of coastal waters".<sup>79</sup> The proximity of the Reef to the Western Australian coast has made it a popular fishing and recreation area. Sole management of a marine park in the reef area could not be undertaken under Western Australian legislation as Ningaloo Reef transcended the three mile boundary between Commonwealth and State jurisdiction established by the OCS. As a result of this particular situation the Ningaloo Marine Park is at present the only MEPA to have been established under joint Commonwealth and State management. The Ningaloo Working Party did, however, emphasise:

that the management of a joint Commonwealth State Marine Park is the prerogative of the State. The agreement [over the proclamation of the park] does not provide for Commonwealth

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<sup>79</sup> R. F. May, R. C. J. Lenanton, and P. F. Berry. *Ningaloo Marine Park: Report and Recommendations by the Marine Park Working Group* (Perth: West Australian National Parks Authority, June 1983): ix.

involvement without the concurrence of the State.<sup>80</sup>

Western Australian officials saw that Ningaloo Reef lent itself to joint State-Commonwealth management but such an arrangement enabled integrated management, involving management of the terrestrial margin, as well as the marine environment to be incorporated. The Commonwealth was therefore drawn into the management of the proposed marine park through geography rather than any great desire to become actively involved in the area. This is a major explanation for the problems experienced in the implementation of joint Commonwealth - State management in the Ningaloo region.

The Western Australian government established a management plan and administrative authority over "its" part of Ningaloo in 1983. The Commonwealth, no doubt because of the pending review of the OCS, and greater interest in the Great Barrier Reef Marine Park, lagged behind in establishing proposals for the outer parts of the proposed park. The Commonwealth management plan for its sector of Ningaloo Reef was not released until May 1990 by the ANPWS. This considerable delay concerned the Western Australian government, however the Commonwealth had also been criticised for its tardiness by a range of non-governmental groups including APEA.<sup>81</sup>

#### **(d) Offshore Minerals**

The limited commercial development of offshore minerals other than petroleum has meant that there has been little pressure to establish an

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<sup>80</sup> Ibid: 30.

<sup>81</sup> Wayne Bennett, APEA pers. comm. October 25 1990. APEA was concerned that the delay in settling arrangements could impact on oil and gas search in the vicinity of the reef.

OCS framework. Although the agreed arrangements foreshadowed that such a regime would be established, no State has enacted complementary legislation. Thus the template envisaged by the OCS for this policy area remains to be implemented. Commonwealth legislation establishing such a regime was passed a year later than the rest of the Settlement, in June 1981, and was proclaimed in early 1990. Although no complementary State or Territory legislation is in place it is possible given the passage of the *State Titles* legislation, and the nexus with "peace order and good government" clauses of each State's constitution, existing State mining legislation could be applied to this regime. The lack of State legislation does not necessarily reflect an absence of interest; sea bed minerals have been discussed at various intergovernmental forums, but rather the lack of commercial interest in terms of exploration. The lack of progress in the Australian offshore minerals regime contrasts with on-going negotiations at the international level, particularly those associated with the United Nations sponsored Preparatory Commission on deep sea bed mining.<sup>82</sup>

In response to international interest in deep sea mineral exploration and exploitation, the Commonwealth Department of Primary Industries and Energy (DPI &E) began negotiations over intergovernmental aspects of the administration of offshore mineral exploration. DPI & E considers that there is a:

need for legislation to control minerals exploration and development in Australia's offshore areas. Consultations on this

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<sup>82</sup> See A. Bergin, "The Politics of PrepCom" *Marine Policy* 12, 3 (October 1987); and G. Triggs, "The 1982 Convention on the Law of the Sea: A Legal Twilight Zone" *Maritime Studies*, 39, (March- April 1988): 1-14.

matter have been held with the States and the Northern Territory at Ministerial and officials level. Amendments to the, as yet, unproclaimed Minerals (Submerged Lands) Act 1981 are being drafted to bring it into line with the Petroleum (Submerged Lands) Act 1967. Complementary State/Northern territory legislation is being prepared.<sup>83</sup>

The *Minerals (Submerged Lands) Act* (Cwth) was eventually proclaimed in February 1990 with the first permit to explore for such minerals (diamonds and other gemstones offshore from the Kimberly region of North Western Australia) granted in July 1990.<sup>84</sup> There is no complementary State legislation yet in force, although increased interest from exploration companies may enhance drafting of such measures. Manganese nodules and polymetallic sulphide deposits form the major valuable deep sea bed minerals.<sup>85</sup> From limited surveys within Australian waters it is apparent that there is "a pavement" of nodules off Cape Leewin in Western Australia, but of an inferior quality to discoveries in the Pacific.<sup>86</sup> Continued exploration for these resources within Australian waters is considered likely in the future, although their exploitation is likely to depend on the discoveries of richer deposits. Costs surrounding the extraction of other sea bed minerals make it unlikely that they will be mined offshore.<sup>87</sup>

The offshore minerals sector illustrates that intergovernmental agreements or arrangements arise when both the Commonwealth and

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<sup>83</sup> Department of Primary Industries and Energy *Annual Report* 1987-88, 57.

<sup>84</sup> *Weekend Australian* 21-22 July 1990.

<sup>85</sup> J. B. Hinwood, "Offshore Engineering" in *Maritime Australia: Exploring the Scientific and Technological Base* Occasional Papers in Marine Affairs 4, (Canberra, Australian Centre for Maritime Studies), 1987, 66.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.* 65.



the States recognise the need for such instruments either in a multi-lateral, or a series of bi-lateral agreements. In the case of seabed minerals the States have not acted under the complementary legislation framework offered them under the rubric of the OCS, although they supported the Commonwealth's proclamation of its legislation.<sup>88</sup> The States responded in a similar manner over ship-sourced marine pollution. In this area the Commonwealth has also acted to regulate activity and it is Commonwealth legislation that "covers the field", although the opportunity exists in the "roll-back provisions" in these Acts for State legislation to be introduced.<sup>89</sup>

#### **(e) Ship-Sourced Marine Pollution**

Ship-sourced pollution involves two aspects, each requiring different legislative and policy responses, and therefore involving different types of intergovernmental interaction. The first and most obvious form of ship-sourced pollution is the accidental discharge of pollutants through collisions, groundings or accidents in loading or unloading cargo. The second form of ship-sourced pollution concerns dumping of wastes, either as terrestrial originated waste material or as ballast water. The former is usually dumped well out to sea on the edge of the continental shelf, and hence is readily regulated under Commonwealth legislation while the latter is more problematic, and is of some concern in inshore areas. Ballast dumping is supposedly regulated, but usually occurs within harbours or close to shore (even though international conventions encourage the transfer of ballast at sea). Ballast water, and

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<sup>88</sup> J. Starkey, Department of Primary Industries and Energy, pers comm. Dec 1989.

<sup>89</sup> An excellent concise discussion of roll-back clauses is found in H. Burmester, "Federalism, The States and International Affairs" in B. Galligan (ed.) *Australian Federalism*, (Melbourne: Longman Cheshire, 1989): 192-216.

the problems of introduced species of flora and fauna contained within it, is emerging as a major source of ship sourced pollution.

The OCS retained arrangements governing the accidental discharge of ship-sourced marine pollution established in 1960 following the passing of Commonwealth and State legislation implementing the 1954 *International Convention for the Prevention of the Sea by Oil*.<sup>90</sup> Although given the opportunity, no State enacted complementary legislation following the proclamation of Commonwealth's *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983. This resulted in necessary amendments to the Commonwealth's legislation "to allow its operation in the territorial sea to the extent that there is no adequate State or Northern Territory legislation on the subject."<sup>91</sup> Several reasons can be postulated for the failure of any of the States to enact such legislation. The first may be a perception that there was no immediate need for State legislation as the Commonwealth legislation was in place. A second factor may be the reluctance of the States to become involved in complex issues raised by compliance with, or

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<sup>90</sup> "The Offshore Constitutional Settlement: A Milestone.....", 16. See also M. Crommelin "Commonwealth Involvement in Environment Policy: Past Present and Future", *Environment and Planning Law Journal*, 4, (June 1987), 107. As Crommelin has noted, developments concerning ship-sourced marine pollution "suggest some modifications to the provisions of the offshore constitutional settlement."

<sup>91</sup> M. Crommelin "Commonwealth Involvement in Environment Policy." Recent developments in Tasmania indicate that there are some problems in controlling a particular form of ship-sourced marine pollution associated with dumping of water ballast from bulk carriers. The discovery of foreign sea weeds and dinoflagellate spores within sediments in the port of Triabunna has been traced to contaminants contained within ballast tanks of bulk woodship carriers using the port. These spores are considered to have the potential to lead to toxic plankton blooms which could damage the developing mariculture industry in the State. This example highlights the intergovernmental aspects of marine resource policy as co-ordination of controls over ballast dumping involves Commonwealth and State agencies and the local port authority, see the *Mercury* 18 May 1988.

enforcing of, international treaties. A third explanation may be that the States did not wish to take responsibility for regulating complex anti-pollution practices, necessary if State legislation was introduced. If such State/Territory legislation was enacted the Commonwealth Act would cease to apply to the area under State jurisdiction, but the roll-back clause would ensure that the MARPOL convention still applied.

The regulation of the dumping of ballast water emerged as a major concern following discoveries of introduced toxic marine organisms and seaweeds. In response to scientific evidence which indicated the potential harm from such organisms the Commonwealth introduced guidelines on the "uptake and discharge" of ballast water in February 1990. These voluntary guidelines were "extended indefinitely" in August 1990<sup>92</sup> and served to complement regulations established in the early 1980s. Australia signed the international Convention on Offshore Dumping in 1973. This convention, popularly known as the London Dumping Convention, came into force in 1975 although "it was applied in Australia on a voluntary basis in co-operation with the states and industry until the *Environmental Protection Sea Dumping Act 1981* was passed to give legislative effect to the Convention."<sup>93</sup> This legislation was enacted within the framework of the OCS. Roll-back provisions enabled the appropriate Commonwealth Minister to make a declaration that the State law was the basis for regulating activity within three miles of the low water mark "if satisfied that the law of the state or Northern Territory makes provision for giving effect

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<sup>92</sup> *Mercury* 6 August 1990.

<sup>93</sup> H. Burmester, "Australia and the Law of the Sea - The Protection and Preservation of The Marine Environment" In K. Ryan (ed) *International Law in Australia*, (Sydney: Law Book Company in association with the Australian Institute of International Affairs, 1984): 443.

to the convention in relation to coastal waters (essentially the territorial sea) of that state or territory."<sup>94</sup>

Amendments to the *Environmental Protection Sea Dumping Act 1981* passed in 1986 removed the need for a Commonwealth permit for loading waste if a State had approved legislation in place.<sup>95</sup> Prior to this amendment the arrangements controlling dumping caused some confusion, chiefly arising from the need for both Commonwealth and State permits which, in effect, replicated each other.<sup>96</sup> This arrangement reflected the general orientation of the OCS where the States were able to assume greater responsibility for activities as long as Australia's obligations in terms of international treaties were maintained. Amendments to the London Dumping Convention mean that signatories to the convention will curtail dumping at sea from 1995, and so further Commonwealth - State interaction is likely as the administrative regime is further modified.

Australia's ratification of international treaties has, therefore considerable significance in the administrative arrangements governing marine pollution. The dumping of radioactive wastes, for example, which are excluded from the more general coverage in the London Dumping Convention, now has to conform to Australian responsibilities under recently signed South Pacific regional treaties. Thus intergovernmental arrangements reflect Australia's commitment

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<sup>94</sup> Ibid: 444. Note that this was written when the Australian territorial sea was still three miles.

<sup>95</sup> J. Brown, (ed.) *Australian Practice in International Law 1986-87* Department of Foreign Affairs and Trade for Public International Law Seminar, (Canberra: Australian National University, 20-22 May 1988): 60.

<sup>96</sup> H. Burmester, "Australia and the Law of the Sea ...", 444.

to regional agreements, chiefly the South Pacific Regional Environmental Protection Convention (SPREP) and the South Pacific Nuclear Free Zone Treaty (SPNFZ, or more correctly, the Treaty of Raratonga). Ratification of these treaties has meant that the Australian States are no longer able to legislate for the loading, dumping or incinerating at sea of radioactive waste.<sup>97</sup> This underscores the point that intergovernmental interaction over domestic policy is influenced by Australia's international personality, which gives primacy to the agreements which are entered into by the state of Australia, as opposed to arrangements practised by the States of Australia.

#### **(f) Fisheries**

The delay in concluding the fisheries component of the settlement has resulted from several factors, including the length of time taken to complete negotiations between the Commonwealth and the States over the classification of fisheries and the resistance of some States to increased involvement of the Commonwealth in day-to-day management.<sup>98</sup> Slow progress could be expected as the fisheries package involved a reorientation of existing practice. The development of new arrangements for the management of stocks which transcended state waters would, naturally take time. The States' initial concerns over some elements of the fisheries package related to the implications arising from a commitment to administer Australian fisheries under "one law". Such proposals were bound to involve lengthy negotiation (and disputation) between the Commonwealth and the States, and also ensured that the fisheries package could proceed

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<sup>97</sup>J. Brown, *Australian Practice in International Law* 1986-87: 60.

<sup>98</sup>A.J. Harrison *The Commonwealth Government in the Administration of Australian Fisheries: A Sort of Mongrel Socialism* RAIPA National Monograph 6 (January 1991).

only at the pace set by the slowest participant.<sup>99</sup>

Chapter Three has indicated that State Ministers had readily agreed that fisheries could be appropriately dealt with under the provisions of the Fraser government's new federalism. This agreement had been reached soon after the election of the new government and well before the OCS had been completed.<sup>100</sup> The emphasis that the Fraser government placed on an organic settlement meant that such ready agreement over fisheries had to wait until other arrangements completing the OCS regime were in place. State fisheries Ministers and the fishing industry were concerned that the fisheries elements were being neglected, a point echoed by the Senate Standing Committee on Trade and Commerce in its major report on the Australian fishing industry released in 1982.<sup>101</sup> The committee observed that:

[i]ndustry has welcomed in principle the proposed new fisheries arrangements provided for in the *Fisheries Act 1980*. However it is concerned that because *the fisheries agreement is only one part of the offshore constitutional settlement package, the new fisheries regime will not be implemented until all the offshore matters are settled despite the fact that agreement has already been reached on the fisheries component.*<sup>102</sup>

The first fisheries arrangements were eventually established in June

<sup>99</sup> R .A. Herr "Federalism and Fisheries" Paper presented to National Fisheries Officers Course Australian Maritime College (November 1987).

<sup>100</sup> B. Chatterton and L. Arnold, "Fisheries Management and the New Federalism" in D. Jaensch, (ed.) *The Politics of the New Federalism* , (Bedford Park: APSA, 1977).

<sup>101</sup> Commonwealth of Australia, Senate Standing Committee on Trade and Commerce, *Development of the Australian Fishing Industry*, (Canberra: AGPS, 1982).

<sup>102</sup> Ibid: 15 (emphasis added).

1986. Although the defeat of the Fraser government in early March 1983 was a contributing factor, the Fraser government's timetable over the offshore settlement placed a low priority on the fisheries elements. The Senate Standing Committee provides a concise summary of this timetable.

In June 1980 it was agreed at the Premiers' Conference that the offshore constitutional settlement was a 'package' and that the following action would be required to be taken by all states and the Northern Territory preparatory to the commencement of all elements of the legislation relating to the settlement;

- \* introduction of legislation in all States and the Northern Territory in respect to petroleum and fisheries;
- \* proclamation of the Coastal Waters (State and Northern Territory Powers) Act when the above is achieved;
- \* adoption of a common mining code for petroleum as a prerequisite to bringing the Coastal Waters (State and Northern Territory Titles) Acts into force;
- \* enactment by all States and the Northern Territory of the necessary complementary fisheries legislation; and
- \* co-ordination arrangements (sic.) for the simultaneous commencement of all eight fisheries laws.<sup>103</sup>

The practical issues relating to the enactment of legislation contributed to, but was not the cause of, the lengthy delay in implementing the OCS arrangements for fisheries. Amendments to State legislation were prepared between 1981 and 1982 as part of the requirements for complementary legislation. Delays arose, and intergovernmental interaction increased over the classification of fisheries. The Commonwealth maintained control over this process as its agreement was needed on any classification. The review of the OCS undertaken by the Hawke government provided an interregnum in which the States

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<sup>103</sup> Ibid: 14.

were able to "renegotiate" earlier arrangements. The re-opening of the negotiations over the classification of fisheries further delayed the process of implementing this package.

The moves to declare a 200 mile fishing zone was yet another factor influencing the implementation of fisheries arrangements. Following the practice of other coastal states to claim extended jurisdiction offshore, Australia announced a 200 nautical mile extended fishing zone in November 1979. The Australian Fishing Zone (AFZ), approximately 1,854,000 square (nautical) miles in area, is the third largest in the world and is approximately equivalent in area to the land mass of Australia. Given the particular oceanographic characteristics of the area, productivity of the marine living resources within this area is limited. Most fisheries resources within the AFZ are considered to be fully developed, if not over-exploited, with little excess capacity. Until UNCLOS III enters force Australia has responsibility for the continental margin in excess of 200 miles offshore off Cape Leeuwin and in the North West Shelf areas of Western Australia.<sup>104</sup>

Intergovernmental relations over fisheries and the declaration of the AFZ were interwoven during negotiations over maritime boundaries in the Timor Sea, Torres Strait and Coral Sea. Determining, and gaining agreement over, these boundaries involved negotiations with Indonesia, Papua New Guinea, France and the Solomon Islands.<sup>105</sup>

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<sup>104</sup> The announcement in September 1991 that Australia will legislate to introduce a 200 mile Exclusive Economic Zone (EEZ) also included a commitment to introducing the definition of the continental shelf under UNCLOS III.

<sup>105</sup> J. R. V. Prescott, *Australia's Maritime Boundaries*, Canberra studies in World Affairs No. 16, (Canberra: Department of International Relations Australian National University, 1985): 74-75; 125-126.



Although the Commonwealth retains control of the negotiation over such boundary treaties or agreements, the State governments retain considerable interests in these matters and can, as was the case with Queensland's concerns over the Torres Strait Treaty, influence the process of negotiation. The incomplete boundary in the Timor Sea was concluded by the "Timor Gap Treaty", in November 1989, which closed the sector of the Australian - Indonesian boundary offshore from the island of Timor. The treaty involved a joint development zone bounded by national zones and, as the area was close to the highly prospective Jabiru and Challis oil and gas fields, was directed at oil and gas rather than fishing.

Negotiations were also shaped by several factors unique to fishery management within a federal political system. Intergovernmental relations were complicated where fisheries involved vessels from different States or which were based on grounds which transcended the offshore extensions of State boundaries. These matters were, however, clarified by the High Court in the *Port Macdonnell* case in 1989. Adopting a "single law" was further complicated where different regulations and management histories or philosophies governed each State's fishery. In Bass Strait, for example, the same fisheries in Victoria and Tasmania were managed by contrasting, and to some extent mutually exclusive, strategies.<sup>106</sup>

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<sup>106</sup> Tasmania operates a system of "open entry" fisheries, with fishermen able to apply for endorsements for particular fisheries once they have obtained a license for their vessel. In Victoria a "limited entry" system is used with fishermen being licensed for a single fishery. Such different management systems were highlighted when vessels from each state were fishing the same waters, usually under Commonwealth licences. The major conflicts arose within the Bass Strait scallop fishery where declining catches

Originally the OCS agreed arrangements proposed a three tiered structure of fisheries administration. Fisheries would be administered by either a State, the Commonwealth or by a Joint Authority. Under the OCS arrangements, where agreement was reached with the Commonwealth, fisheries administered by a State could extend to the edge of the AFZ. The "default" position within the OCS fisheries arrangement was to retain the *status quo*, that is licensing and management under overlapping State and Commonwealth legislation and regulation. In order to reduce complexity and the effects of spillovers the Commonwealth would retain control over foreign fisheries within the Australian (Extended) Fishing Zone (AFZ) and retain control of highly migratory species such as the Southern Bluefin Tuna. The Commonwealth's position in the tuna fishery was, according to Herr and Davis, reinforced by "a transcendent international obligation through the membership of a regional regulatory organisation",<sup>107</sup> the South Pacific Forum Fisheries Agency.

The question of managing fisheries across jurisdictional boundaries was of particular interest to the States. Earlier discussion has indicated that the fisheries package within the OCS "agreed arrangements" was designed to include four joint authorities, with possibility of other joint authorities being established if an agreement was reached between the Commonwealth and the appropriate State(s). The Commonwealth

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focused the fishermen's dissatisfaction over these conflicting management philosophies. See M. Haward, *Institutions, Interest Groups and Marine Resources Policy*, Ch 4.

<sup>107</sup> R. A. Herr and B. W. Davis, "The Impact of UNCLOS III on Australian Federalism": 690.

promoted the joint authority as a significant achievement in the co-operative management of fisheries, and saw such bodies as having the ability to administer fisheries through the issue of licences.<sup>108</sup> In practice, however, there has been little progress towards the establishment of these bodies. Long-standing tension between the State and Commonwealth fisheries agencies, and sometimes vitriolic confrontations between State agencies, have contributed to the limited success of joint authorities. The States, particularly Tasmania, questioned the legal basis for joint authority licences, seeing this as adding to, rather than reducing complexity in fisheries management. The lack of enthusiasm from the States for the joint authority system is perhaps understandable as they had little chance of winning a dispute within the joint authority.

While the OCS "agreed arrangements" fostered the use of joint Commonwealth - State authorities to manage particular fisheries, the only examples of such formal arrangements are within Torres Strait, where the Commonwealth administers the fisheries on behalf of the Queensland government, and in Western Australia where a newly established joint authority has been established for the South - Western demersal shark fishery. The latter joint authority has been established under State legislation. The Australian Fisheries Service of the Commonwealth Department of Primary Industry and Energy<sup>109</sup> took

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<sup>108</sup> D. Macdonald "Fishermen and the Offshore Constitutional Settlement" *Australian Fisheries*, (February 1982): 2-3.

<sup>109</sup> The Australian Fisheries Service (AFS) was replaced in February 1992 by the Australian Fisheries Management Authority (AFMA) a statutory authority charged

the view that any joint authority should be established under the "most appropriate legislation".<sup>110</sup>

With the Western Australian shark fishery a recent exception, the States' reluctance to embrace joint authorities relates to the explicit Commonwealth veto built into the agreed arrangements. The lack of unanimous support for the OCS fisheries packages, has been fuelled by State concerns that they enable increased Commonwealth involvement in fisheries management. As the fisheries arrangements evolve, further collaboration through joint authorities is possible. New South Wales' opposition to Commonwealth interference has, for example, moderated following retirements of "States rights" oriented officials and Ministers. The importance of personalities reinforces Simeon's, and Warhurst's, arguments over intergovernmental diplomacy. Changes in personnel were believed to have facilitated the adoption of the OCS style arrangements in NSW, although as yet these have not been implemented.<sup>111</sup> Even in fisheries where the Commonwealth has sole responsibility, the States are able to influence the outcomes of management plans. Attempts to restrict the incidental catch (or non-target species) of Southern Bluefin Tuna as part of a management plan for the South Eastern Tuna Fishery was strongly opposed by the States. Although a compromise was reached over the level of incidental catch, the flurry of activity it engendered illustrated again the intergovernmental dimension to a fishery that was managed by the Commonwealth. What is clear, however, is that the Commonwealth cannot unilaterally impose policy directives on the

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with controlling Commonwealth fishing activities.

<sup>110</sup> H. Lis, AFS, pers. comm. 5th December 1989.

<sup>111</sup> Interviews with Commonwealth and State officers in 1989, 1990 and 1991.

States, needing instead a consensus through the AFC and/or its standing committee.

Implementation of the OCS fisheries package emphasises what may be termed the "positive" and "negative" elements of intergovernmental interaction. Agreement over management practices, or the need to take action in fisheries suffering severe declines in catch (and profitability) is enhanced by intergovernmental collaboration. In contrast the ability of States to "hold out" against co-operative efforts in attempts to retain control or autonomy, or even to frustrate developments they consider to be detrimental to their interests, may be a more common response. It is probably no surprise that the Bass Strait Scallop fishery, the first management regime to be established under the OCS, was one which involved extensive inter State rivalry and dispute. The Bass Strait scallop regime was developed in response to problems in managing the fishery and disputed rights over particular grounds.

Tasmanian fishermen resented Victorian fishermen (with Commonwealth licences) fishing scallop beds off the coast of Tasmania. Conflict was heightened by differences in management strategies and fisheries practices adopted by the Victorian and Tasmanian governments over the scallop fishery. Tasmania and Victoria appealed for the Commonwealth to act on access to Bass Strait fishing grounds, but on predictable grounds. Tasmania argued that the OCS would enable Victorian fishermen to be excluded, while Victoria argued that the OCs framework enabled open access outside three miles from low water mark. The impasse was resolved with the introduction of a

management regime in June 1986 which created two zones of State jurisdiction extending twenty miles offshore from low water mark in Tasmania and Victoria. The Commonwealth would control the "central zone" between the two States. The scallop management regime was established following Commonwealth agreement that the fisheries component of the OCS would be implemented on a fishery by fishery basis.

Following further negotiations between the Commonwealth and the States, arrangements were gazetted on the 1 June 1987 concerning agreement over the OCS fisheries package for fisheries in waters off Queensland, South Australia, Western Australia and Tasmania.<sup>112</sup> These agreements established that the management of the tuna fishery and the fishery within the area of Australian jurisdiction in the Torres Strait Protected Zone would be under Commonwealth law, and also determined which fisheries would be managed under "State law". With the agreement on the Bass Strait scallop fishery concluded the previous year involving Victoria, the OCS extended to five States, with New South Wales choosing to opt out of the OCS arrangements.

Individual fisheries arrangements established under the 1987 bilateral agreements were the focus of legal challenges in 1988 and 1989. While important in terms of future fisheries management this action had important implications for the future of the offshore constitutional settlement. The challenges were made by third parties, individuals or fishermen's organisations, rather than the States (who supported the OCS), but focused on the constitutional validity of the legislation

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<sup>112</sup> *Commonwealth of Australia Gazette* S104 1 June 1987 and "OCS now extends to Five States" *Australian Fisheries*, 46, 6 (June 1987): 16-17.

underpinning the OCS. The *Port Macdonell* case was directed at the arrangements which established the management of the South Australian southern rock lobster fishery as a State fishery and the validity of the *Coastal Waters (State Powers) Act 1980*. The second case, *Harper v the Minister for Sea Fisheries*, indirectly questioned the validity of the *Coastal Waters (State Titles) Act 1980* in a challenge over the level of licence fee in the Tasmanian abalone fishery.

The *Port Macdonell* case (*Port Macdonell Professional Fisherman's Association Inc v South Australia and the Commonwealth*)<sup>113</sup> arose from the opposition of the fishermen to management decisions made under South Australian laws and regulation following arrangements entered into following the implementation of the OCS fisheries regime. As Waugh noted:

South Australian management of this fishery has been extended beyond the usual limit of three miles from shore (or from the closing lines of certain bays and gulfs) by intergovernmental arrangements made under matching provisions of the Fisheries Act 1952 (Cth) and the Fisheries Act 1982 (SA). These matching provisions are part of the fisheries component of the OCS, and it is this extended jurisdiction of the state which is now under challenge.<sup>114</sup>

The challenge to the validity of the arrangements over the Rock Lobster fishery in *Port Macdonnell* proceeded on two levels. The first assumed that the OCS fisheries package was valid and argued that the arrangements for the South Australian fishery were not supported by

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<sup>113</sup> *Port Macdonell Professional Fisherman's Association Inc v South Australia and the Commonwealth* (1989) 63 A.L.J.R. 671.

<sup>114</sup> J Waugh "Offshore Fisheries - High Court Challenge" *Intergovernmental News*, 1, 4 (April 1989): 5.

the legislation. An important aspect of this element of the challenge is that the waters defined by the arrangements "encroached on Victorian coastal waters and were therefore not waters 'adjacent' to South Australia".<sup>115</sup> The second level of the challenge had greater significance as it was:

based on constitutional grounds. It [was] argued that the operation of South Australian legislation in the fishery beyond three miles is not supported by section 5 (c) of the Coastal Waters (State Powers) Act 1980 (Cth) which purports to give the States extended legislative power over fisheries where intergovernmental fisheries management arrangements are made.<sup>116</sup>

The challenge to the constitutional validity of the *Coastal Waters (State Powers) Act* - particularly as this would inevitably involve a consideration of the validity of Section 51(xxxviii) - raised the level of dispute from simply a matter of local concern to involve all States. If the first level of the challenge was upheld other fisheries arrangements made under the OCS would be invalidated on the same grounds. If the second level, the constitutional level, of the challenge to the validity of the *Coastal Waters (State Powers) Act 1980* was upheld then as Waugh states "it would involve sweeping consequences since it would imply that the whole of the *Coastal Waters (State Powers) Act* is invalid." <sup>117</sup>

The High Court delivered a joint judgement which held that the arrangements regarding the management of the rock lobster fishery was valid "within waters adjacent to the State"<sup>118</sup> and was supported by

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<sup>115</sup> Ibid.

<sup>116</sup> Ibid: 5-6.

<sup>117</sup> Ibid.

<sup>118</sup> *Port Macdonell Professional Fisherman's Association Inc v South Australia and the Commonwealth* (1989) 63 A.L.J.R. 689.



both Commonwealth and South Australian legislation. The Court also found that the *Coastal Waters (State Powers Act) 1980* (Cwth) "is a valid law of the Commonwealth and that there was no inconsistency between aspects of the South Australian and Commonwealth fisheries Acts. The High Court also examined, for the first time, the Offshore Constitutional Settlement, providing a concise summary of the effect of the OCS arrangements, the use of Section 51 (xxxviii), and a detailed examination of the definition of "adjacent area" of the State relating to the *Coastal Waters (State Powers) Act*.<sup>119</sup> The definition of the adjacent area was, as indicated earlier, a crucial element in the challenge from the Port Macdonell Fishermen's Association. During the negotiations of fisheries agreements Commonwealth and State officials had believed the notion of "adjacent" was flexible and could be established according to fish stocks.<sup>120</sup> The High Court examined the boundary of the rock lobster arrangement and established that it included "2000 km<sup>2</sup> of sea on the Victorian side of the line of equidistance drawn from the intersection of the South Australian and Victorian border with the coastline and which is part of the "adjacent area" in respect of the *Petroleum (Submerged Lands) Act 1967*.<sup>121</sup>

Although differing from the boundaries established under the *Petroleum (Submerged Lands) Act 1967*, the problem in the definition of the adjacent area did not directly invalidate the arrangements over the management of the South Australian rock lobster fishery. These arrangements were originally established under the OCS on 13 April

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<sup>119</sup> Ibid. 675.

<sup>120</sup> H. Lis pers. comm. December 1989.

<sup>121</sup> *Port Macdonell Professional Fisherman's Association Inc v South Australia and the Commonwealth* (1989) 63 A.L.J.R. 676.

1987 and amended by a second arrangement on 1st November 1988.<sup>122</sup> The second arrangement was necessary "as the earlier arrangement did not define the boundaries of the rock lobster fishery to which it applied."<sup>123</sup> The amendment was introduced *after* the writ issued by the Port Macdonnell Fishermen's Association had been lodged in the Adelaide office of the High Court of Australia in September 1987. The issue of the amendment to the arrangements was of little importance; the High Court noted that "argument in case was predominately directed to the second arrangement".<sup>124</sup>

The High Court found that "the references to the part or parts of the territorial sea that are adjacent to that 'State' or 'Territory' in the definition of 'coastal waters' in s4A of the Commonwealth *Fisheries Act* must be construed as being a reference to a discrete area separated from the 'coastal waters' of an adjoining state or territory by a fixed boundary."<sup>125</sup> The Court found that "appropriate fixed boundary lines" were those identified by the *Petroleum (Submerged Lands) Act*<sup>126</sup> bringing, perhaps unwittingly, the OCS back to the organic basis envisaged by the Fraser government.

Following the decision in the *Port Macdonnell* case, brought down in October 1989, the Australian Fisheries Service contacted all State and Territory Ministers to canvass their opinions on the findings of the

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<sup>122</sup> *ibid* 673. See also Commonwealth of Australia Gazette No. S104 (Special) (1 June 1987): 8; Commonwealth of Australia Gazette No. S406 (Special) (21 December 1988): 1-2.

<sup>123</sup> *Port Macdonnell Professional Fisherman's Association Inc v South Australia and the Commonwealth* (1989) 63 A.L.J.R. 673.

<sup>124</sup> *Ibid*.

<sup>125</sup> *Ibid*: 679.

<sup>126</sup> *Ibid*.

Court, and whether there was any need to amend legislation in the light of the decision.<sup>127</sup> *Port Macdonnell* meant that greater care was needed to define adjacent areas, and following the High Court's view of appropriate boundaries as being established by the *Petroleum (Submerged Lands Act)*, some alteration to existing fisheries arrangements may have been needed.<sup>128</sup>

The *Port Macdonnell* case did, however, validate the use of Section 51 (xxxviii) as the anchor for the *Coastal Waters (State Powers) Act 1980*. The attitude of the High Court in this matter follows the view established in *Re Duncan* and in earlier cases where the court saw intergovernmental co-operation as an essential and integral part of the Australian system. The High Court would not invalidate such agreements or consider them justiciable as long as some link with constitutional powers or the executive power of the Commonwealth could be established. Cullen has suggested that "the remarkably cooperative nature of the 1979 settlement likely fortified the Court's disposition towards finding the scheme to be constitutionally valid."<sup>129</sup>

The second challenge to the OCS, *Harper v Minister of Sea Fisheries*,<sup>130</sup> concerned the legality of state fisheries arrangements, and indirectly raised a challenge to the *Coastal Waters (State Titles) Act*.

<sup>127</sup> H. Lis, pers. comm. December 1989.

<sup>128</sup> Such an outcome had been foreshadowed by Waugh who argued that a possible solution would be to include more specific geographic references in such arrangements as the Court was likely to clarify the notion of "adjacency" which would limit the area under which such arrangements can be applied. J. Waugh, "Offshore Fisheries - High Court Challenge": 5-6.

<sup>129</sup> R. Cullen, "Case Note: *Port Macdonnell. PFA inc v South Australia*" *Monash University Law Review*, 16, 1 (1990): 129.

<sup>130</sup> *Harper v Minister of Sea Fisheries* (1989) 63 A.L.J.R. 687.

Harper, a Tasmanian abalone diver, originally challenged the right of the Tasmanian government to levy license fees in this fishery, (which, under regulations promulgated in 1987, could exceed \$20,000 dollars for certain divers). Harper claimed that this license fee was a "duty of excise", and therefore *ultra vires*. An amended statement of claim, in addition, included a challenge to the validity of the *Coastal Waters (State Title) Act* to return "title" of the three mile limit to the state. The challenge reflects the nature of the fishery as the abalone is a sedentary, or slow moving, mollusc (sometimes described as a marine "snail") found on rocky coastal margins of the coast and on reefs well within the three mile boundary of the Tasmanian fisheries jurisdiction. The abalone is harvested by divers prising the mollusc from these rocky areas, and like the southern rock lobster, is highly prized as a quality seafood in Asia making it a high value fishery.

The involvement of the *Coastal Waters (State Titles) Act 1980* was part of the strategy adopted by the lawyers representing Harper. If it could be shown that this legislation was invalid, and that Tasmania did not control this area, the question of an excise would be on stronger ground. If the *Coastal Waters (State Title) Act 1980* was valid the implication was that the State "owns" the abalone and the license fee could be argued to be a royalty, and not an excise.<sup>131</sup> The announcement that the original writ would be amended, and the new argument would include a reference to the *Coastal Waters (State Title) Act* caused a disruption to the case before the High Court. An adjournment was granted as it was clear that under the conditions of

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<sup>131</sup> J Waugh, pers. comm. 3 April 1989.

the amended statement of claim other States may wish to intervene. In the event *Harper* was decided on different grounds from *Port Macdonnell*. The excise claim was thrown out and, the validity of the *State Title Act* was not tested. *Harper* did reinforce the legal basis of fisheries license fees charged by State governments, in themselves an important resource in intergovernmental bargaining.

The decision in the *Port Macdonnell* case saw the the OCS arrangements legally entrenched a decade after the agreement was released. Cullen has noted that "the brevity of the reasoning causes one to wonder if the court was, at least partly, impressed by the fact that this settlement was the outcome of an *agreement* between the Commonwealth and the States."<sup>132</sup> In spite of some modifications being necessary to some fisheries arrangements arising from the *Port Macdonnell* case, the OCS has, none the less been strengthened. The High Court's decision reflects its longstanding attitude to the "political" basis of intergovernmental agreements and more recent reluctance to overturn these arrangements.

While the challenge to the validity of fishery arrangements under the OCS had some implications for the nature of the settlement in the 1990s, it is important to note that the OCS framework has been extended from the original parameters set by the "agreed arrangements". The development of Commonwealth legislation governing the establishment of offshore installations such as floating hotels, while not part of the agreed arrangements, shows the ongoing development of the OCS as a framework for intergovernmental

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<sup>132</sup> R. Cullen, "Case Note: *Port Macdonnell PFA inc v South Australia*": 129.

relations offshore. The development of an OCS style arrangement for offshore tourism reinforces the argument for the emergence of the sectoral approach.

#### **(g) Offshore Tourism and Related Activities**

Developments on the edge of the Great Barrier Reef in the mid 1980s introduced pressures to regulate the operation of floating hotels and other tourist activities. The proposal to establish a floating hotel on John Brewer Reef, part of the outer Barrier Reef seventy-three kilometres offshore from the North Queensland coast, initiated the Commonwealth's *Sea Installations Act 1987*.<sup>133</sup> Ancillary legislation was prepared to amend customs, excise, quarantine, migration, tariff and taxation laws so that any such installation did not fall outside Australian jurisdiction. Any confusion over what comprised a "sea installation" was avoided by incorporating a definition of such installations as a "man made structure which can be used for an environmental related activity". Oil platforms, drill ships or defence installations were specifically excluded from the ambit of the *Sea Installations Act 1987*.

The legislation and administrative arrangements for this regime followed the pattern established in other OCS packages, particularly those encompassed in the *Petroleum (Submerged Lands) Act*. This

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<sup>133</sup> The hotel development on John Brewer Reef was opposed by environmentalists who argued that such developments were unsympathetic to the ecology of the reef systems with particular problems concerning mooring and waste removal. After commencing operation the hotel, did not maintain commercial viability and was removed from the reef and towed to Vietnam to operate as a wharf-based hotel in May 1989.

Further proposals for tourism developments in the offshore zone ensure that this issue will remain on the agenda.

meant that the Commonwealth retained its legal powers over developments on the continental shelf, but delegated day-to-day administration of the legislation to the appropriate State government. Attempts by the Queensland government to pass legislation regulating such developments were overturned by this legislation although the Commonwealth undertook to reimburse the State for administrative costs incurred in administering its legislation. Levies gained from any permits would, however, accrue to the Commonwealth. Like other OCS legislation the *Sea Installations Act 1987* does not apply to the area under State jurisdiction from low water mark to the three mile boundary.<sup>134</sup> Opposition members raised some concerns over the Commonwealth's power over the allocation of permits and argued that the commitment to a consultative process over such permits did not guarantee that allocation of permits would not be made arbitrarily by the Commonwealth.<sup>135</sup>

#### (h) Coastal Zone Management

Although coastal zone management was not included in the OCS agreed arrangements it has emerged as a major issue in contemporary Australian intergovernmental relations. Although several of the OCS packages have an impact on coastal management, the lack of an integrated approach has resulted from a lack of coordination between different governments. Although primary responsibility for protection of coastal environments and management of coastal resources falls to State and local government, there is a recognition that many of the problems emerging in the coastal zone, as well as planning for the

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<sup>134</sup> Following Australia's extension of its territorial sea to 12 miles the confusion over three mile boundary has been reduced.

<sup>135</sup> Commonwealth Parliamentary Debates (House of Representatives) 5/5/ 1987: 2591-2592.

future may be beyond the financial capacity of the States and /or local governments to solve.<sup>136</sup>

Numerous Commonwealth and State inquiries have been held into coastal management with thirteen reports from the Commonwealth alone related to this area. Many of these reports contained a recognition that the management of the coastal zone involved intergovernmental coordination, with various recommendations - including the establishment of a specific coastal ministerial council - proposed as a means of achieving this coordination. There seemed little need to duplicate further the work being undertaken by established ministerial councils given that coastal management had been a longstanding topic on the agendas of meetings of the Australian and New Zealand Environment Council (ANZEC) and the Council of nature Conservation Ministers (CONCOM). ANZEC sponsored a major national conference on coastal management in 1986, although little action occurred until the level of coastal pollution, of both point and non-point source origin, attracted public concern. The visible increase in levels of sewerage pollution on beaches in major metropolitan areas led to demands for action from local, State and Commonwealth governments.

Several initiatives were established between 1989 and 1991 in response to this increased concern from Commonwealth and State governments. In June 1989 the House of Representatives Standing Committee on Environment, Recreation and the Arts (HORSCERA)

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<sup>136</sup> See House of Representatives Standing Committee on Environment, Recreation and the Arts *The Injured Coastline: Protection of the Coastal Environment*, (Canberra: AGPS, 1991) and M. Haward and A Bergin "Australian Intergovernmental Relations and Coastal Zone Policy" In O.T. Magoon, H. Converse, V. Tippie, L.T Tobin and D. Clark (eds) *Coastal Zone 91: Proceedings of the Seventh Symposium on Coastal Zone Mangement* ( New York, ASCE 1991): 737-751.



began an inquiry on the protection of the coastal zone. The terms of reference for the inquiry included "the review of previous parliamentary reports relating to the coastal zone" and "the role of the Commonwealth Government in ensuring the proper management of the coastal zone".<sup>137</sup> The report from this inquiry was presented to parliament in April 1991 with the Commonwealth announcing that it intended to develop a national coastal policy in April 1992. In May 1990 the then Independent Senator Irina Dunn presented a Bill to the Senate which proposed an amendment of the *Coastal Waters State Powers Act 1980* (Cwlth) "to give the Commonwealth express powers to formulate codes of practice for the conduct of environmentally sensitive operations within the coastal sea, and in the event that a state does not comply with and apply such codes, to make regulations for their enforcement".<sup>138</sup> This Bill lapsed when Senator Dunn failed to retain her seat in the Senate following the half Senate election of March 1990.<sup>139</sup>

The central role of the Commonwealth in any national coastal strategy had been recognised by both Commonwealth and State governments. HORSCERA recognised the importance of setting agreed national standards for water quality, with the Commonwealth best placed to initiate discussion on these standards. The Premiers of New South Wales and Queensland had, as part of broad-based criticisms of Australian federalism, supported discussion of the respective roles of the States and the Commonwealth in such areas of environmental management. The Premiers' concerns were supported by other State

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<sup>137</sup> *The Injured Coastline*: vii.

<sup>138</sup> Commonwealth Parliamentary Debates (Senate) 16/5/ 1990: 429.

<sup>139</sup> Under Section 13 of the Constitution Senate terms begin on "the first day of July following the day of election", hence Dunn was still sitting even though she had been defeated.

and Territory leaders and led to Prime Minister Hawke supporting a "closer partnership with the States". This in turn led to discussions which initiated what became known as the Hawke government's "new federalism".

Two other initiatives from the Commonwealth reflect the growing salience of coastal management. A proposal for a National Working Group on coastal management was announced by the Minister for the Environment in February 1990 coordinated by the Department of Arts, Sport, Environment, and Territories (DASET). DASET began to focus on coastal zone matters although its influence was limited by the small number of staff available to provide support in this area.<sup>140</sup> The Resource Assessment Commission (RAC) (established by the Hawke government in July 1989) was informed that it would be charged with an inquiry into aspects of coastal zone management. The reference needed to establish the RAC coastal zone inquiry was forwarded to the Commission from the Prime Minister in September 1991, with Special Commissioners appointed in February 1992. The RAC inquiry was to report to the Prime Minister by November 1993.

The Commonwealth's activities have been matched by increased activity in coastal management by the States. In October 1990 the New South Wales government released a coastal policy statement. This statement did not, however, apply to the area from Newcastle to Wollongong, arguably the area with the greatest pressures on coastal resources and with the greatest impacts from urban and industrial effluent. Queensland released a coastal policy paper in April 1991

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<sup>140</sup> C. Steele, DASET, pers. comm. July 1990

which reflected increasing concern with the impacts of tourist developments in the coastal margin. Tasmania, planning to link into the RAC process, began work on a coastal policy in June 1991, with a discussion paper released in September of that year. Victoria released a major study on the state of the coastal environment in May 1992, having completed a revision to its 1988 coastal policy in 1991.

The States and the Commonwealth support greater intergovernmental coordination over coastal zone management. Integration of a range of ecological, social and economic values necessary for effective management of the coastal zone involves each tier of government increasing the imperatives for the establishment of an intergovernmental regime. A model of such an intergovernmental regime for coastal zone management could be derived from experience in United States.

The intergovernmental regime for the coastal zone management in the United States was established in the early 1970s, "an unusually productive period of innovation in legislation designed to develop, preserve and protect marine resources".<sup>141</sup> Each piece of legislation contributed to an increased role for the federal government, yet "intergovernmental relations took their distinctive contours for each resource use from legislation, court decisions, and from the experience of implementation".<sup>142</sup> The 1972 Coastal Zone Management Act (CZMA) originated from widespread concern over the degradation of

<sup>141</sup> M. Silva, and L.King "Ocean Resources and Intergovernmental Relations: The Record to 1980" in M. Silva, (ed.) *Ocean Resources and U.S. Intergovernmental Resources in the 1980s*, (Boulder: Westview Press, 1986): 75.

<sup>142</sup> *Ibid*: 76.

coastal environments, "and was the product of a number of distinctive legislative interests that evolved through the late 1960s."<sup>143</sup> Avoiding treating the coast as a narrowly defined sector, the CZMA attempted "to take a comprehensive approach to reconciling pressures for both conservation and development along the nation's shorelines".<sup>144</sup> The act

asserts 'a national interest in the effective management, beneficial use, protection and development of the coastal zone'. To realize these diverse and frequently conflicting goals the act set up grant-in aid programs to provide financial incentives for coastal states to 'exercise their full authority over the lands and waters in the coastal zone'.<sup>145</sup>

The provision of incentives to facilitate State participation in coastal management under the CZMA occurred as the federal government had to recognise State jurisdiction onshore and within three miles of low water mark.<sup>146</sup> As Silva and King comment "political feasibility dictated that the program be a voluntary process between the States and the federal government."<sup>147</sup> Incentives included grants to support the preparation of management plans and, following Federal approval of the plan, further funds to implement the plan. Additional grants were available for plans which promoted marine sanctuaries or fostered

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<sup>143</sup> Ibid: 75.

<sup>144</sup> Ibid: 93.

<sup>145</sup> Ibid.

<sup>146</sup> As a result of the "tidelands saga", described briefly in Chapter Two, the United States Congress passed legislation granting the States jurisdiction from low water mark. This legislation, the Submerged Lands Act of 1953, created State waters from low water mark to three miles offshore and provided an important model for the Australian OCS.

<sup>147</sup> M. Silva, and L.King "Ocean Resources and Intergovernmental Relations: The Record to 1980": 93.

public access to beaches.<sup>148</sup> The States were encouraged to participate through the CZMA's "consistency provision", a commitment that federal agencies or individuals would act consistent with the State developed coastal zone management plan.<sup>149</sup>

Hildreth has noted that "the CZMA's consistency provisions have assumed greater importance in the 1980s while the flow of federal funds [to the program was] reduced".<sup>150</sup> The significance of the consistency provision has increased in the intergovernmental battles over oil and gas leasing under the Outer Continental Shelf Lands legislation. Numerous lower and Supreme Court actions arose from States, chiefly California, asserting that the sale of such leases contravened the consistency provision of the CZMA. The revalidation of the CZMA in 1990, and the reinforcement of the consistency provisions of this legislation through judicial review has led to a view that the future of the coastal zone management programme in the United States is providing the opportunity for diversity of responses from the States, while at the same time ensuring sound management of the US coasts.<sup>151</sup> The announcement by President Bush of his Coastal America initiative in February 1991 has meant that, as in Australia, public concern over the state of the coastal and marine environment in the United States has placed intergovernmental relations over coastal management high on the political agenda.

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<sup>148</sup> Ibid: 94.

<sup>149</sup> R. Hildreth, "Ocean Resources and Intergovernmental Resources in the 1980s: Outer Continental Shelf Hydrocarbons and Minerals", 175.

<sup>150</sup> Ibid.

<sup>151</sup> D. Brower and D. Owens "Coastal Zone Management" presented at Coastal Zone 91 Conference, Long Beach USA July 1991.

Following submissions which urged Australia to investigate the utility of the US framework as a basis for the ongoing management of the Australian coastal zone *The Injured Coastline* recommended, *inter-alia*, that:

The Commonwealth provide financial assistance to State and local governments as part of a National Coastal Management Strategy. The provision of such funding would be based on fulfilment of certain performance criteria, which ensure that State, regional and local plans are consistent with the agreed national objectives and work towards achieving those objectives.<sup>152</sup>

It is likely that coastal management will emerge as the major focus for intergovernmental interaction in the next decade, and emerge as a further sector under the OCS framework. Coastal zone management requires arrangements which allow sufficient flexibility to manage a widely diverse range of coastal environments, with differing pressures exerted upon them, while at the same time taking account of the national and regional significance of the resources and benefits of these areas.<sup>153</sup>

The implementation of the OCS has provided a template and a framework for intergovernmental interaction over offshore resources. The implementation of the OCS illustrates that, as Rosenthal and Hoefler have suggested, the constitutional division of powers and responsibilities establishes a "structure of relations" between governments. The emergence of the sectoral approach was inevitable given the character of this relationship, and as such is the latest stage of the evolution of federalism offshore. The OCS agreed arrangements

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<sup>152</sup> *The Injured Coastline*: xiv.

<sup>153</sup> M. Haward and A Bergin "Australian Intergovernmental Relations and Coastal Zone Policy"

facilitate intergovernmental collaboration, formally recognise the interests of the States, but also allow the Commonwealth considerable influence in the development of marine resources policy. The potential of a Commonwealth veto in these policy areas is perhaps a paradox in the light of the OCS's avowed commitment to "co-operative federalism", although it explains the ongoing dynamic underpinning continued intergovernmental tensions over marine resources policy, particularly fisheries, that have been experienced in Australia following the launching of the OCS.

The examination of the implementation of the "settlement" highlights much about the dynamics of intergovernmental relations and of the ability of the States to influence outcomes in intergovernmental arenas. In spite of this the States found that entrenching the offshore settlement did not preclude the Commonwealth from continuing to pursue an active interest in State activities such as fisheries management. In terms of oil and gas the States did not pursue questions of an improved share of revenues nor did they attempt to gain "ultimate management rights in [this] far more economically important, continental shelf offshore zone."<sup>154</sup>

Although the States had great influence in the design of the agreed arrangements, many aspects of the intergovernmental disputes which had characterised offshore federalism from the 1950s to the end of the 1970s were carried over into the implementation of the OCS sectors. Such disputes reflect the essential federal character of the offshore settlement, and the importance of constitutional, political and administrative parameters in shaping arrangements in this area. These issues are developed in the following chapter; an assessment of federalism and the Australian Offshore Constitutional Settlement.

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<sup>154</sup> R. Cullen, "Case Note: Port Macdonnell PFA inc v South Australia": 130.

## Chapter Six

### Federalism and the

#### Australian Offshore Constitutional Settlement

The offshore was a central item in interaction between the Commonwealth and State governments from the early 1950s to the late 1980s. This interaction was punctuated by several major events, the 1967 offshore Petroleum Agreement, the *Seas and Submerged Lands* case brought down in late 1975 and the announcement of the OCS agreed arrangements in mid 1979. These constitutional, legislative and administrative developments conform to two broad phases; first there was the struggle between the Commonwealth and the States over jurisdiction followed by the second phase in which a collaborative intergovernmental regime over the offshore was established. Once jurisdictional issues were settled by the outcome of the *Seas and Submerged Lands* case and the proclamation of the Commonwealth's *Coastal Waters (State Titles) Act 1980* in February 1983, the offshore became a routine item within the intergovernmental machinery. In this latter period Commonwealth - State interaction concerned practical issues of resource management or regulation of activities, rather than the high politics of the struggle over jurisdiction which had dominated the earlier intergovernmental agenda.



Analysis of the OCS illustrates the various influences on Commonwealth - State interaction. In particular, this study concentrates on the relationship between the structural (and institutional) features of the federal system and the processes of federalism and intergovernmental relations which arise from this structure. The "ebb and flow of seashore federalism"<sup>1</sup> provides important insights into broader issues of Australian federalism by examining how the "structure of relations" can determine intergovernmental arrangements.

The preceding chapters emphasise the substantial limitations of focusing solely on the apparent expansion of Commonwealth influence in the offshore, even if this is the most visible artefact of such interaction. In spite of the central role of the Commonwealth in specific marine resource policy sectors, as detailed in Chapter Four, the OCS cannot be adequately explained by traditional interpretations of Australian federalism; interpretations described as the "unity preference" tradition in Australian federal analysis.<sup>2</sup> Using this

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<sup>1</sup> P. Weller, *Malcolm Fraser PM : A Study in Prime Ministerial Power* (Ringwood, Penguin 1989).

<sup>2</sup> In general, with some important exceptions, the study of Australian federalism has remained bound to a tradition that views federalism as obsolescent, inefficient and conservative. This literature, with some significant exceptions, has concentrated on the negative impacts of federalism, leading to the dominance of what Galligan has recently termed the "unity-preference tradition in Australian political thinking". The assumptions that overlap in responsibility between the Commonwealth and the States provided a limitation on central policy making were used to explain the "evils", "frustrations" and "failures" and underpinned examinations of the "costs" of federalism. At its most extreme formulations this perspective argues for a bypassing, or abolition, of the States and other institutions, particularly the Senate. See B. Galligan, "A Political Science Perspective" in B. Galligan, (ed) *Australian Federalism*, (Melbourne: Longman Cheshire, 1989: 47-50.

interpretation the offshore illustrates general trends in Australian federalism where the expansion of the reach of Commonwealth powers by the High Court and increasing vertical fiscal imbalance<sup>3</sup> have allowed successive Commonwealth governments to expand their interests and influence in areas previously the responsibility of State governments.<sup>4</sup> Intergovernmental relations under the unity preference approach thus reflects a response to the incremental growth in Commonwealth involvement and, as a result, the development and broadening of Commonwealth - State interaction but with the Commonwealth the dominant party. This approach implicitly

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<sup>3</sup> Vertical fiscal imbalance refers to the disparity between a State government's revenue raising capacity and its financial responsibilities. The wartime arrangement to centralise the collection and disbursement of income taxation were the focus of High Court challenges in 1942 and 1957 in the *Uniform Tax* cases. The outcome of these cases was to entrench the war-time income tax agreement and to give Australia the greatest fiscal centralisation of any federation; see B. Galligan, O. Hughes, and C. Walsh "Introduction" in B. Galligan, O. Hughes, and C. Walsh (eds) *Intergovernmental Relations and Public Policy*, (Sydney: Allen and Unwin, 1991).

<sup>4</sup> The expansion of Commonwealth constitutional powers began with the overturning of the doctrine of "implied immunities" in the *Engineers'* case and continued with the interpretation of the external affairs power in the 1970s (*Seas and Submerged Lands* case) and the 1980s (*Koowarta* and *Franklin Dam* cases). The current High Court has expanded the potential reach of Commonwealth powers through its decision in *Cole v. Whitfield*, which has simplified the issues surrounding the interpretation of section 92 of the Constitution. The impact on the Commonwealth's powers as a result of *Cole v. Whitfield* has been seen as "a revolution on the High Court" [see D. Solomon, *Australian Society* (June 1998)], however Labor's "reconciliation with federalism" and the attempt to establish a new federalism in 1990-91 has made the Commonwealth reluctant to expand the potential of this interpretation. See B. Galligan and D. Mardiste, "Labor's Reconciliation with Federalism", *Australian Journal of Political Science*, 27, 6 (March 1992): 71-86; and D. Solomon, "Chifley Lives on the High Court" *Independent Monthly* (February 1992). The examination of the influence of shifts in legal doctrines which underpinning the High Court's deliberations are examined (from different perspectives) by B. Galligan, *The Politics of the High Court: A Study of the Judicial Branch of Government in Australia*, (St Lucia: University of Queensland Press, 1987) and L. Zines, *The High Court and the Constitution*, (2nd ed.) (Sydney: Butterworths, 1987).

assumes the State's influence declines, in zero-sum fashion as the Commonwealth's day to day responsibilities increase. That the States were able to mount effective responses to the Commonwealth's action in extending the reach of its constitutional powers and its increase in legislative and administrative involvement, effectively limit the utility of the incremental, zero-sum argument. To limit analysis to the increased reach of the Commonwealth constitutional powers, legislation and administrative arrangements in marine resource policy making and management ignores the fact that the States remained significant actors in this area and retained considerable powers over regulation of resource users.<sup>5</sup>

While the increase in Commonwealth involvement has led to overlapping responsibilities for the management of marine resources a concomitant outcome was increased collaboration rather than a decline in State activity. It is clear that the increased presence of the Commonwealth in offshore matters did not reduce the involvement or significance of the States. A more appropriate evaluation of Australian federalism, supported by this study, recognises and takes account of the countervailing parameters of intergovernmental interaction. At the same time as the Commonwealth expanded its interests the State governments and bureaucracies began to assert, with greater force, their long standing interests in what were to them traditionally important areas of public policy, including the management of marine resources.

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<sup>5</sup> M. Haward, "The Offshore" in B. Galligan, O. Hughes and C. Walsh, (eds.) *Intergovernmental Relations and Public Policy*, (Sydney: Allen and Unwin, 1991): 121-122.

The States retained legislative competence over the management of fisheries and joint management (with day-to-day authority) over oil and gas management even following the resolution of the dispute over jurisdiction in the Commonwealth's favour. Such legislative competence over fisheries could even include an extra-territorial dimension; that is State law could be enforced outside the territorial limits of the State if a sufficient nexus could be shown between the legislation and the "peace order and good government" of the State, a crucial element in each State's constitution.<sup>6</sup>

The commonwealth had recognised this competence; even the *Seas and Submerged Lands Act 1973* retained significant savings clauses for State legislation which did not claim sovereignty over the seabed or sub-sea resources. The inclusion of such savings clauses can be interpreted as reflecting an awareness of the importance of the States' role in the management of activities such as fishing.<sup>7</sup> Such savings clauses reflect Commonwealth recognition of specific interests or areas where the States have expertise.

The States' legislative responsibilities over offshore resources provided a key element in the establishment of intergovernmental arrangements for collaboration between governments in the implementation of various aspects of marine resource policy. All policy areas involve some degree of "co-operation" between the

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<sup>6</sup> With the passage of the *Australia Acts* in 1986 unresolved questions surrounding the extra territorial character of State legislation (which has a particular significance for fisheries management) were resolved by the inclusion of an extra territorial clause in the *Australia Acts* legislation. See R. Cullen, *Federalism in Action* (Sydney: Federation Press, 1990): 129.

<sup>7</sup> An alternative explanation may relate to the relative economic insignificance of fishing as opposed to offshore mineral or hydrocarbon resources.

Commonwealth and the States in spite of the broadening of the reach of constitutional powers and the dominant fiscal position of the Commonwealth. The States, and their bureaucracies, remain important, and sometimes the only feasible, actors through which policy can be implemented. Policy areas such as the offshore, which in Grodsonian terms display a "marbling" of responsibilities,<sup>8</sup> reflect the mutual dependence of each unit of government.<sup>9</sup> Notwithstanding the interdependence of intergovernmental interaction this study has argued that the implementation of the OCS shows this interaction is based on a broad acceptance of the independence of all parties. Greater Commonwealth involvement in particular policy areas is a sufficient, but not a necessary outcome of the imperatives created by interdependence.

Co-ordination of resource management raises interesting constitutional questions in relation to situations where State officers are responsible for implementing Commonwealth laws, or conversely, where Commonwealth officers are constrained by State legislation and regulations.<sup>10</sup> There are no "consistency provisions" - where Commonwealth agencies must act in a manner consistent with

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<sup>8</sup> C. Fletcher, "Rediscovering Australian Federalism by Resurrecting Old Ideas" *Australian Journal of Political Science* 26, 1 (March 1991): 79-94.

<sup>9</sup> F. Scharpf, "Interorganizational Policy Studies: Issues, Concepts and Perspectives in K. Hanf and F. Scharpf, (eds.) *Intergovernmental Policy making: The Limits to Coordination and Central Control*, (London: Sage, 1978): 345-370. F. Scharpf, "The Joint-Decision Trap: Lessons From German Federalism and European Integration", *Public Administration*, 66 (Autumn 1988): 254-258.

<sup>10</sup> L. Zines, *The High Court and the Constitution*. Such issues raises significant legal interest and has been the focus of much attention by Commonwealth and state legal officers and legal academics. As long as the arrangements which establish the cross-vesting are not seen as *ultra vires* these concerns will remain academic.

relevant State laws - in Australia as found in the United States Coastal Zone Management Act 1972. However, cross-vesting of regulatory responsibilities between Commonwealth and State officers is common. Australian fisheries regulations enable officers to enforce, if necessary, both State and Commonwealth laws. This reflects the practical sense of reducing costs in enforcing agreed policy objectives.

The development of the OCS through the innovative approaches and practical skills of State officials, and the ongoing role of the States in offshore policy, provides a counter to perspectives which see the increasing influence of the Commonwealth reducing the impact of State or local government to "mere" agencies or administrators of national policy. This argument was developed by Sawyer who has claimed that continual interaction within a federal state would lead to what he termed "organic federalism", the final stage of a continuum incorporating a series of more or less identifiable stages - beginning with a co-ordinate model along Whearean lines and then moving through an intermediate stage stage of co-operative federalism to organic federalism.<sup>11</sup> Sawyer stated that at this point:

organic federalism does demand that the centre should play the dominant role; it must determine all major substantive policies and in particular spending choices and then supervise the regions in giving effect to such choices. The regions become to a considerable extent 'mere administrators'.<sup>12</sup>

Although Sawyer admitted in works published in the 1960s that "the political taxonomist may hesitate to describe . . . [organic federalism] as federal at all"<sup>13</sup> in the 1970s he argued that the key to characterising

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<sup>11</sup> See G. Sawyer, *Modern Federalism* (London: Watts, 1969) and *Federalism under Strain: Australian 1972-1975*, (Melbourne: Melbourne University Press, 1977).

<sup>12</sup> G. Sawyer *Federation Under Strain*: 6.

this model as federal was the continued existence of some guarantee that the regions in "their reduced role" will continue to exist and be able to fight any attempt by the centre to abolish them altogether or to reduce their functions beyond some minimal level.<sup>14</sup> Rather than simply reiterating the importance of the entrenchment of the formal constitutional structure, Sawyer argued that such guarantees for the autonomy of the region included political as well as legal processes. Sawyer recognised the fundamental principles of a federal system as increasing the opportunities for political interaction between constituent elements. In the case of the offshore, and arguably in other areas of Australian public policy, it is this interaction which limits the extent to which organic federalism can be established. In the offshore petroleum and marine pollution regimes the States are, however, constrained by policy set by the Commonwealth.

### **The OCS and the Parameters of Intergovernmental Interaction**

This study has developed a framework in which Commonwealth - State interaction over the offshore is shaped by a series of parameters arising from the relationship between the structural (and institutional) features of a federal division of powers and the processes of federalism and intergovernmental relations. Each of these parameters can alter particular aspects, or the arena, of interaction but together they combine to facilitate intergovernmental, rather than separate Commonwealth or State outcomes. Thus the patterns and outcomes of Australian federalism are developed within arenas established by the constitutional division of powers, the process of judicial review, or domestic legislation giving effect to international treaties.

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<sup>13</sup> G. Sawyer *Modern Federalism*: 125.

<sup>14</sup> G. Sawyer *Federalism under Strain*: 6.

Intergovernmental interaction emerges from the establishment of separate independent entities by the constitution which at the same time forge institutions which interact within the "political process". Shared interests in policy issues and outcomes reinforce the interdependence of these entities. The study of Australian federalism and the offshore shows that this political process, defined and constrained by changes in domestic and international law, creates what Lucas has called "the political constitution".<sup>15</sup> The political constitution is a shorthand for that set of institutions and processes emerging from collaboration over a range of policy areas giving rise to a set of "rules" which are supplementary to, but informed by, the formal (sometimes seen as the "black letter") constitution.<sup>16</sup> The significance of the extra-legal dimension was noted by Sawyer in an important work on Australian federalism and judicial review published in the mid 1960s:

The dynamics of the Australian federal system derive almost entirely from the political process, not from the law. The function of the legal constitutional system is mainly the negative one of setting the limits within which the politicians and civil servants can operate, though ...it would be misleading to suggest that they can operate only within those limits; they sometimes find ways of

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<sup>15</sup> A. R. Lucas "Harmonization of Environmental Policies" in J. O. Saunders, (ed.) *Managing Natural Resources in A Federal State: Essays from the Second Banff Conference on Natural Resources Law*, (Toronto, Carswell 1986): 35. See also B. B. Boer and D. Craig, "Federalism and Environmental Law In Australia and Canada", in B. Hodgins, J. J. Eddy, S.J., S. D Grant and J. Struthers (eds) *Federalism in Canada and Australia: Historical Perspectives*, (Peterborough: The Frost centre for Canadaian Heriatge and Development Studies, Trent University, 1989): 303.

<sup>16</sup> This view of intergovernmental interaction is close to the "new institutional analysis" associated with the work of Elinor Ostrom. See E. Ostrom, "A Method of Institutional Analysis" in F.X. Kaufmann, G Majone and V. Ostrom, (eds.) *Guidnace, Control and Evaluation in the Public Sector*, (New York: Walter de Gruyter, 1986): 459-479.



evading or disregarding the legal limits.<sup>17</sup>

Evidence of "the political constitution" can be seen in a range of policy areas offshore but is particularly relevant in the context of Commonwealth-state negotiations over the management of the Great Barrier Reef Marine Park and fisheries described in the previous chapter. The enhancement of State interests and the willingness of the States to press individual claims, is an important counter to the Commonwealth's increasing visibility in decision making. The establishment of numerous ministerial councils dealing, however transcendently, with offshore issues was a crucial element in Australian intergovernmental relations over the offshore. At these meetings the States exerted considerable influence over general matters in designing the OCS, but also addressed specific issues. While the States unanimously supported the increase in the "limits and powers of the States" necessary to anchor the OCS and remained responsible for policy and management of resources in the three mile zone, individual States, not surprisingly, had their own agenda reflecting the centrality of particular issues.<sup>18</sup>

The entrenchment of the OCS in February 1983 enabled the States to counter the Commonwealth's increased formal constitutional powers offshore. It is tempting to see the OCS as reflecting the limitations of the legal - constitutional framework to provide mutually satisfactory

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<sup>17</sup> G. Sawyer, *Australian Federalism in the Courts*, (Melbourne: Melbourne University Press, 1967): 6.

<sup>18</sup> Queensland's determination to retain a role in the management of the Great Barrier Reef; Victoria's attempts to increase its share of oil and gas royalties and Tasmania's concern at the impacts of Commonwealth licenses in State management of fisheries are examples of issues presented at intergovernmental forums.

outcomes to intergovernmental disputes. At one level, however, this perspective is limited; accepting that intergovernmental agreements are designed to reduce the level of intergovernmental conflict or sidestep the unfavourable outcomes of judicial review means that the 1967 Petroleum Agreement and the OCS are just further examples of a well developed Australian response to the demands (and constraints) of joint action. At another level the argument can be falsified by pointing out that the Commonwealth retained a considerable influence in offshore policy, at times determining outcomes, or constraining State policy responses, in certain of the agreed arrangements. The empirical material on the interaction leading to the agreements over the offshore indicates, however, that the Petroleum Agreement and particularly the OCS were based on something more than the Commonwealth's desire to harmonise differences with the States to achieve outcomes in its favour.

### **Intergovernmental Agreements over the Offshore**

Intergovernmental collaboration can only be achieved by the parties to the arrangement acting in consort. Integral assumptions of bargaining analysis or game theory are that individual parties will interact over the bargain or continue to play the game. If one party pulls out there is no bargain, or the game remains incomplete, satisfying no-one. In practice much of the process of intergovernmental negotiation is taken up with avoiding the disintegrative results of such zero-sum outcomes. Removing or reducing discordant voices to maintain harmony may be as important as establishing the basis of the chorale, therefore determining who is to take part in the bargain or in the game is an important factor in determining outcomes.

Chapman, building upon and at the same time conflating Wiltshire's extensive list of factors leading to intergovernmental agreements (see Chapter One), considers that intergovernmental agreements reflect three distinctive situations:

1. governments at the national and subnational spheres may share the same objectives and wish to agree on policies or at least on strategies to establish a common policy;
2. governments may have policy differences or wish to impose different priorities even though their objectives are ultimately the same; and
3. governments may be antagonists either because their policy interests are incompatible for partisan or regional reasons or because they are competing, or think they are competing, for scarce resources.<sup>19</sup>

Obviously none of these categories is mutually exclusive. The preceding chapters show how the positions of each of the parties to the OCS developed over time, yet throughout this period it is possible to identify elements corresponding to each of Chapman's criteria.

Certainly there was agreement to establish a common policy or strategy to overcome the difficulties posed by the High Court decision in the *Seas and Submerged Lands* case, once the Fraser government indicated its willingness to incorporate these matters into its new federalism agenda. Chapman's second criteria is useful in explaining the pressure placed on the Fraser governments by Premiers Court and Hamer to include "the seas and submerged lands matters" within the ambit of the new federalism. Each of the States had different concerns during the OCS negotiations reflecting the diversity of interests in offshore

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<sup>19</sup> R.J.K. Chapman, "Intergovernmental Forums and the Policy Process": 104.

policy. The fact that the States identified jurisdiction as a priority - initially over the three mile limit but with a late attempt to claim jurisdiction if and when Australian moved to a twelve mile territorial sea - led to the Commonwealth acting to retain its interests in areas such as the management of the Great Barrier Reef and in fisheries.

Chapman's third category is more difficult to identify, simply because most of the negotiations took place outside the political arena where partisan or regional claims are more likely to be publicised. None the less, while partisan politics tended to be understated in the negotiations within the special committees of Solicitors-General it is clear that such imperatives surfaced in response to actions from the officials' "political masters". Queensland's attempt to establish a formal written treaty binding the Commonwealth arose at a time when the dispute over the Great Barrier Reef was at its height, and the Queensland government was maintaining its aggressive "states rights" position from the earlier confrontations with the Whitlam government.

One interesting feature of the empirical material is that non-governmental interests were excluded from negotiations in all of the proposed OCS regimes. The reactions of the major resource user groups to the announcement of the OCS were to reserve judgement; an oil and gas industry commentator considered the arrangement a possible "millstone" rather than "a milestone" in resources management.<sup>20</sup> Fisheries groups supported the proposed rationalisation of regulations under the OCS but were concerned at the

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<sup>20</sup> P.C. Reid. "Commonwealth-State Relations, Offshore Mining and Petroleum Legislation; Recent Developments: A Historic Milestone or Millstone?" *Australian Mining and Petroleum Law Journal*, 2, 2 (1980): 58-76.

length of time taken to implement the arrangements. Given the fact that interest groups were excluded from the process it is not surprising that the only legal challenges to the legitimacy of the OCS were mounted by a fishing organisation and an individual fisherman in the *Port Macdonell* and *Harper* cases.

The *Port Macdonell* case emphasises that intergovernmental agreements may not reflect the views of "third parties".<sup>21</sup> Equally each party to the agreement may have different motives in concluding such an arrangement. The OCS avoided the political costs of the Commonwealth asserting its claims over the offshore, and enabled it to maintain its influence in key areas, while giving away very little. For the States the agreement process reinforced their status in the policy area, and enabled them to maintain the legitimacy of their administrative and regulatory instruments. Formal agreement reinforces the roles of the respective governments in a particular policy area, even if at a symbolic level. This may explain "the luxuriant flowering"<sup>22</sup> of intergovernmental arrangement as the States, as constituent governments within the federal system, see such measures as reinforcing their place in the system. Intergovernmental agreements show that *interdependent* action is based upon a recognition of the roles and functions of *independent* political entities.

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<sup>21</sup> See N. Bankes, "Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia", *Alberta Law Review*, XXIX, 4 (1991): 792-838.

<sup>22</sup> G.C. Sharman, "The Bargaining Analogy and Federal State Relations", in R.M. Burns, G.C. Sharman, G. Stevenson, P. Weller and R.F.I. Smith, *Political and Administrative Federalism*, Research Monograph 14, Centre for Research on Federal Financial Relations, (Canberra: ANU, 1976): 13; see also C. Sharman, "Grappling with Proteus - A Survey of Intergovernmental Relations", *Australian Journal of Public Administration*, 53 (1984): 287.

Agreements between the constituent governments are significant features in any federal system, although it is evident that similar institutions and arrangements are also found in unitary systems.<sup>23</sup> Collaboration or agreement leading to joint action is not new, with each of the classic federations emerging from a process of agreement among colonies to establish a federal compact. Davis pointed out (in an article written over thirty years ago) that "the special interest which arises . . . [in a federal system] is occasioned not by the existence or growth of large scale administrative co-operation between the general and regional governments but by *the various patterns of collaboration into which these governments may enter and may have entered*".<sup>24</sup> The "patterns of collaboration" may be quite distinctive, reflecting the influence of different constitutional, political and/or administrative imperatives. A comparison between the 1967 Petroleum Agreement and the OCS shows, among other things, the influence of significant changes in the relative constitutional positions of the Commonwealth and the States *vis. a vis.* jurisdiction offshore which had occurred between 1967 and 1979.

Intergovernmental agreements, like other contracts, can be made in different ways. Under the law of contract a verbal agreement is binding but is less enforceable than a written contract.<sup>25</sup> Written

<sup>23</sup> See, for example, the impact of such agreements in the British unitary system in R. A. W. Rhodes, *Beyond Westminster and Whitehall*, (London: Unwin Hyman, 1987).

<sup>24</sup> S.R. Davis, "The Federal Principle Reconsidered", *Australian Journal of Politics and History*, 1 (1955-56): 70 (emphasis added).

<sup>25</sup> The High Court has, of course, viewed intergovernmental agreements as not justiciable as formal contracts at law. See N. Bankes, "Co-operative Federalism: Third Parties" and C. Saunders, *Accountability and Access in Intergovernmental Affairs: A*

agreements may differ in complexity, or the extent to which they bind each party. Australian intergovernmental agreements over the offshore reflect this difference. The 1967 Petroleum Agreement was established by a written "treaty" and included mirror legislation replicating arrangements between the Commonwealth and States. The OCS was less formal and saw the administrative arrangements developing from agreed positions concerning the responsibilities of the Commonwealth and the States. A complementary legislative framework implemented a territorial basis to these responsibilities and gave a template for administrative arrangements. Indeed, until the proclamation of the final components of the *Coastal Waters* legislation in 1983, the OCS was simply based on the resolutions of the October 1977 Special Premiers' Conference.

Wiltshire notes that the extensive interdependence of the Australian federal system is the "basic reason" for the development of intergovernmental agreements but implies that this has left the federal system in disarray:

the coordinate or layer cake model of federalism envisaged by the Australian . . . founding fathers can no longer exist. . . . The federal system . . . [is] no longer coordinate as the actions of each level of government have significant effects on other units, and moreover, there are many government functions which are nowadays performed by more than one level.<sup>26</sup>

The paradox implicit in Wiltshire's analysis is that in areas such as the offshore, the process where "the actions of each level of government

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*Legal Perspective*, Papers on Federalism 9, Intergovernmental Relations in Victoria Programme (Melbourne: Melbourne University Law School, 1984).

<sup>26</sup> K. Wiltshire, *Planning and Federalism*, (St Lucia, University of Queensland Press 1986): 139.

have significant effects on other units", such interdependence is based upon, and leads to a strengthening of *each* level of government. The examination of Australian federalism and the offshore tends to counter Wiltshire's more pessimistic view of the future role of the States, a view expressed in a recent monograph that "Geoffrey Sawer's organic federalism is here to stay".<sup>27</sup>

While not disputing Wiltshire's account of the interdependence between levels of government, this statement invites further consideration in the light of the entrenchment of the OCS. The design of this agreement deliberately took advantage of particular constitutional provisions enhancing intergovernmental co-operation<sup>28</sup> included in the Australian constitution. Examination of convention debates of the 1890s supports the view that the Australian framers had a more flexible view of federalism than that ascribed to them by Wiltshire.

It is interesting that the Australian framers established a concurrent constitutional framework while at the same time drawing much of their understanding of the United States system from Bryce's *American Commonwealth*.<sup>29</sup> Bryce emphasised the independence of each tier of government; using a metaphor of a factory, where belts crossed over one another yet did not interfere with other machines, to

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<sup>27</sup> K.Wiltshire, *Tenterfield Revisited*, (St Lucia: University of Queensland Press 1991): 22.

<sup>28</sup> See also C. Saunders, *Intergovernmental Arrangements: Legal and Constitutional Framework*, Papers on Federalism 14, Intergovernmental Relations Program (Melbourne: Centre for Comparative Constitutional Studies, September 1989).

<sup>29</sup> J. Warden, "Federalism and the Framing of the Australian Constitution" Paper presented to the University of Tasmania June 1989 and *Federal Theory and the Formation of the Australian Constitution*, unpublished PhD thesis Australian National University, 1990.



describe the federal arrangement. Elazar has shown that extensive intergovernmental interaction in the nineteenth century United States (the period that Bryce depicted) questions the appropriateness of Bryce's coordinate or dual "model of federalism".<sup>30</sup> In establishing a concurrent basis for the Australian constitution, the framers expected that interaction between the Commonwealth and States would occur. Statements in the convention debates clearly indicate that individual delegates saw this process as continuing into the future. In terms of fisheries, for example, Deakin argued that although the fisheries power was concurrent, he could not see the role of the States being diminished.

### Judicial Review and Intergovernmental Agreements

The distinction between the political nature of intergovernmental agreements and formal legal obligations arising from them raises several issues concerning the constitutional status of such agreements. As the High Court gave "apparently definitive answers" in *Re Duncan* regarding the validity of Commonwealth - State agreements, Saunders believes that this decision was "likely to encourage the development of further co-operative arrangements".<sup>31</sup> To give some sense of scale Bankes notes that "in Canada there are more than a thousand such agreements and in Australia one author estimates there to be at least 325."<sup>32</sup>

<sup>30</sup> D. Elazar, "Federal-State Collaboration in the Nineteenth-Century United States" *Political Science Quarterly*, 79 (June 1964): 248-281 reprinted in A. Wildavsky, (ed) *American Federalism in Perspective*, (Boston: Little, Brown, 1967): 190-222.

<sup>31</sup> C. Saunders, *Accountability and Access in Intergovernmental Affairs: A Legal Perspective*, 8.

<sup>32</sup> N. Bankes, "Co-operative Federalism: Third Parties..", 793.

The High Court's reluctance to unravel co-operative agreements between the constituent elements of the federation makes such arrangements attractive for both the Commonwealth and the States. Not surprisingly, given the High Court's view of the legal basis of such agreements and the problems of third parties in gaining standing, a limited number of High Court cases have considered the legal questions arising from co-operative (or joint) action by the Commonwealth and the States. Of these *Re: Duncan*<sup>33</sup> provides the most detailed consideration by the High Court of intergovernmental agreements.<sup>34</sup> As Bankes notes "although the court spilled a lot of ink on the ability of the two governments to enter into agreements to create joint authorities, in the end it did not appear particularly relevant"<sup>35</sup> in deciding the case. In spite of this, the judgements handed down in *Re: Duncan* are valuable as several members of the Court provided detailed considerations on the necessity of Commonwealth - State co-operation and on the validity of intergovernmental agreements or arrangements. Justice Deane stated

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<sup>33</sup> *Re Duncan: Ex Parte Aust. Iron and Steel Pty Ltd* (1983) 57 A.L.J.R. 649. While *Re Duncan* did not directly concern issues of offshore jurisdiction members of the High Court held that the use complementary Commonwealth and State legislation establishing a co-operative administrative body, in this case coal industry industrial relations tribunal, was a valid constitutional exercise, and that such co-operation and agreements between the Commonwealth and the States were valid as long as they did not contravene the constitution. Chief Justice Gibbs did refer to the innate good sense of cooperative arrangements concerning fisheries enforcement in his judgement.

<sup>34</sup> C. Saunders, *Accountability and Access*. *Re: Duncan* followed earlier cases where the Court had found that intergovernmental agreements were not justiciable as contracts; in particular *P.J. Magennis Pty Ltd v. the Commonwealth* (1949) 80 C.L.R. 382 which concerned a challenge over the agreement for Commonwealth acquisition of land for soldier settlement and *South Australia v. the Commonwealth* (1962) 108 C.L.R. 130 which concerned an agreement from the Commonwealth to provide a standard gauge rail line.

<sup>35</sup> N. Bankes, "Co-operative Federalism: Third Parties..", 831.

that:

co-operation between the Parliaments of the Commonwealth and the States is in no way antithetic to the provisions of the Constitution: to the contrary, it is a *positive objective of the Constitution*. . . . It would be inconsistent with that objective for there to be any general constitutional barrier to concurrent legislation by Commonwealth and State Parliaments.<sup>36</sup>

In the same case Justice Mason reiterated the views he expressed in the earlier *Australian Assistance Plan (AAP)* case,<sup>37</sup> and considered that "a federal constitution which divides legislative powers between the the central legislature and the constituent legislatures *necessarily contemplates that there will be joint co-operative legislative action to deal with matters which lie beyond the powers of any single legislature*."<sup>38</sup>

Justice Mason's interpretation of the "classic" federal principle emphasises that the crux of this principle is not the legislative autonomy of each legislature but the integral nature of intergovernmental interaction. Co-operative legislative action dealing with "matters which lie beyond the powers of any single legislature" raises the question of the limits of joint action. Mason's argument contains an implicit assumption that the means and ends of such schemes are constrained only by the limits of executive power within the constitution.

These arrangements are limited to the extent that agreement can be reached between the respective governments although such

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<sup>36</sup> *Re Duncan: Ex Parte Aust. Iron and Steel Pty Ltd*, (Deane J.) 671 (emphasis added).

<sup>37</sup> *Victoria v The Commonwealth and Hayden* (1975) 134 C.L.R. 338.

<sup>38</sup> *Re Duncan: Ex Parte Aust. Iron and Steel Pty Ltd*, (Mason J.) 658 (emphasis added).

agreement does not forestall constitutional challenges made by third parties excluded from the negotiation over, and the implementation of, the agreement.<sup>39</sup> Although driven by political imperatives the limits of intergovernmental agreements may, as in the case of the OCS, be subject to judicial review arising from these challenges as "third parties are more likely to be affected by legislation [or regulations] implementing an agreement than by the agreement itself."<sup>40</sup> Saunders believes that judicial review of such arrangements may increase because:

[a]s long as the [ministerial] councils were purely advisory or consultative bodies no question of judicial review arose. As soon as the councils are invested with power, either to make decisions themselves or to make recommendations on which the eventual decision makers may or must act, the possibility emerges that persons affected by such decisions will seek to challenge them on the grounds that, procedurally or in substance, they are unlawful.<sup>41</sup>

The literature on intergovernmental agreements in Australia and Canada notes that that routine collaboration between government units within each federal system can emerge in policy areas which previously had been the focus of contentious intergovernmental disputes. What is interesting about the OCS (and the offshore oil and gas accords in Canada) is the deliberate use of extra-constitutional solutions or frameworks to achieve the desired collaboration between central and sub-national governments.

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<sup>39</sup> As witnessed in challenges to the coal industry agreement (*Re: Duncan*) and to the agreed arrangements over particular fisheries (the *Port Macdonell* case),

<sup>40</sup> N. Bankes, "Co-operative Federalism: Third Parties..", 794.

<sup>41</sup> C. Saunders, *Accountability and Access in Intergovernmental Affairs*, 22.

### Intergovernmental Institutions, Processes and the Offshore

As each unit of government is forced to interact with others, the resources, staff and commitment to maintain this interaction reinforce the standing of their unit of government. Participants (either politicians, or most usually, officials) in negotiations giving rise to intergovernmental agreements such as the OCS represent their particular government and hence reinforce claims to be consulted, involved and accommodated. While this may lead to what Wiltshire has considered to be "significant effects" on other units, each unit is able to mobilise an equally diverse set of resources. As shown in the preceding chapters these resources ranged from the expertise of legal officers through to the offshore, or particularly "States rights", being used as an election issue.

The analogy of diplomacy, with the intergovernmental negotiators as emissaries of their respective governments, may explain some of the outcomes in the OCS negotiations. It is clear that the State Solicitors-General were concerned with the retention of State interests within the three mile limit, and hence pursued a policy of retaining "state sovereignty"<sup>42</sup> in this area. Such a strategy precluded other options, for example pressing for increased State control of offshore oil and gas revenues, from being considered. It is interesting to consider some of the reasons for the States' responses in relation to the oil and gas sector of the OCS, particularly as the Canadian outcomes were so dissimilar. The intergovernmental settlements over the Nova Scotia and Atlantic

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<sup>42</sup> Notwithstanding the contradictory nature of the claim for sovereignty the States vigorously pursued the retention of State interests in their immediate reaction to the introduction of the *Seas and Submerged Lands Act*, the subsequent High Court hearings and in the meetings which led to the OCS.

Accords in Canada that gave the provinces significant regulatory autonomy and a substantial share of revenues from these developments.<sup>43</sup>

A major influence was the fact that legal issues dominated the OCS negotiations. The delegation of the seas and submerged lands matters to the committees of Commonwealth and State Solicitors-General, and the pre-eminent role of these officials may have contributed to the particular pattern of the arrangement. The jurisdictional strength of the Commonwealth over offshore oil and gas, deriving from the nexus with the United Nations Convention on the Continental Shelf and the outcome of the *Seas and Submerged Lands* case, may also explain why this part of the OCS simply updated those established by the 1967 Agreement. An important contextual issue is the existing pattern of financial equalisation in Australia. The role of the Grants Commission would make any State wary of affecting its particular "relativity". The pattern of federal financial relations differs in Canada, however, and the financial package under the Atlantic Accord "appears to insulate [Newfoundland's] equalisation payments for twelve years after offshore production commences".<sup>44</sup>

The response of the Solicitors-General conforms to Warhurst's analysis of intergovernmental relations where the key role of such individuals and institutions in Australia is concerned with *managing*

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<sup>43</sup> See R. Cullen, *Federalism in Action: The Australian and Canadian Offshore Oil and Gas Disputes*, (Sydney: Federation Press, 1990), especially chapters 5 and 6. See also M. Haward "Intergovernmental Relations and Offshore Resources Policy in Australia and Canada" *Australian - Canadian Studies* 9, 1-2, (1991): 35-51. See also R. Cullen, "Bass Strait Revenue Raising: A Case Of One Government Too Many?", *Journal of Energy and Natural Resources Law*, 6, (1988): 213-247.

<sup>44</sup> R. Cullen, *Federalism in Action*: 187.

interaction rather than with questions of policy. The latter is usually left to particular departments.<sup>45</sup> The Solicitors-General became the "intergovernmental affairs specialists" in this particular arena, reflecting the need to manage a contentious policy area.. Given this it is not surprising that few questions were raised over policy in particular packages. The coordinating role of the "special committees of Commonwealth and State Solicitors-General", described in Chapter Three, was central to the development of the OCS. Maintaining control precluded extensive consultation with other government agencies and non-governmental groups.<sup>46</sup>

As intergovernmental managers, charged with providing a means of implementing the resolutions from the Special Premiers' Conference, the Solicitors-General suffered, not unexpectedly, the fate of central agencies who "won few friends amongst functional departments,"<sup>47</sup> excluded from the process of intergovernmental negotiation. The decline in the influence of the Solicitors-General during the implementation of the OCS, at which time the functional departments and *their* intergovernmental machinery and networks began to dominate, reflects and reinforced the general shift to a sectoral orientation in the OCS. This shift was made at a time when intergovernmental management was no longer pressing. The decline in tension (with some occasional flurries of excitement in fisheries

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<sup>45</sup> J Warhurst, "Managing Intergovernmental Relations" in H. Bakvis and M. Chandler, (eds) *Federalism and the Role of the State*, (Toronto: University of Toronto Press, 1987): 259-276.

<sup>46</sup> P.C. Reid, "Commonwealth-State Relations, Offshore Mining.."

<sup>47</sup> J. Warhurst, "Intergovernmental Managers..", 273.

management) over the offshore during the implementation of the OCS reflects the shift from high to low intergovernmental politics, and less confrontationalist politics of Commonwealth - State relations.

### **The Politics of Commonwealth State Relations**

There are several explanations for the impetus from both the Commonwealth and the States to conclude an agreement over the offshore. Although there had been considerable opposition from the States to any increase in Commonwealth involvement in the offshore areas prior to the *Seas and Submerged Lands* case, the High Court's decision left the States with little, if any, constitutional bargaining power. It is also interesting that the Premiers of the then Labor governed States of New South Wales, South Australia and Tasmania all supported the OCS initiative in the face of hostility from both the federal Parliamentary Labor Party and the national ALP conference.<sup>48</sup> The bi-partisan support from the States indicates the significance they placed upon the "settlement" of federal - state conflict although as the *Australian Law Journal* noted, it was "to a large extent a framework within which administrative practices must perforce develop if there is to be harmonious co-operation between the Commonwealth and the States."<sup>49</sup>

This comment provides a useful means by which to interpret the OCS, and illustrates the major difference between it and the earlier 1967 Petroleum Agreement. The latter included detailed administrative arrangements for the management of offshore oil and

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<sup>48</sup> E. G. Whitlam, *The Whitlam Government: 1972-1975*, (Ringwood: Penguin, 1985): 259.

<sup>49</sup> Anon., "The Offshore Constitutional Settlement" - Current Topics *The Australian Law Journal* 54, 9 (September 1980): 519.



gas, (reproduced in Appendix One), while the OCS arrangements were an adumbration of this "framework for administrative practices" (see Appendix Two). Chapter Three has shown how the agreed arrangements followed a commitment from Prime Minister Fraser to The Victorian and Western Australian Premiers for a co-operative resolution of the "offshore problem". From this commitment a policy framework of "co-operative federalism" emerged in both functional and spatial terms. The implementation of the OCS, as described in Chapter Four, has seen the ongoing development of the "framework for administrative practices" and the emphasis on the sector approach which has maintained the Commonwealth's interests in each sector, at times conflicting with the early objectives of the agreement.

Turning attention to the way the OCS was developed provides an answer to conundrums raised in early studies of the OCS. Cullen identified the major difference between the OCS and the 1967 agreement as the terms of the agreement and emphasised that "the actual agreement between the parties resulting from the [OCS] offshore negotiations has not been published."<sup>50</sup> The material presented in Chapter Three, indicates that there is no "written agreement" over the OCS, rather the development of a consensus arrangement springing from agreed resolutions from the Premiers Conference.<sup>51</sup> State officials' (with carriage of "the seas and

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<sup>50</sup> R. Cullen, *Australian Federalism Offshore*, 1st ed. (Melbourne: Intergovernmental Relations In Victoria Programme, Law School, University of Melbourne, 1985): 68. Cullen was writing without the benefit of archival sources available to this study which make it clear that the reason for the "actual agreement" not being released is that no such document exists.

<sup>51</sup> The question of the "intentions of the parties to the offshore arrangements" was

submerged lands matters") suppression of the Queensland proposal for a written agreement between the Commonwealth and States was related to the desire to entrench the commitments at the 1977 Premiers' Conference. Such concern was probably justified as the nascent OCS had to survive two federal elections, (with the federal opposition formally committed to implementing the *Seas and Submerged Lands Act 1973*) before being proclaimed during the 1983 election campaign.

One should not be too surprised that the State Solicitors-General opposed the Queensland proposition to use a written agreement to "bind the Commonwealth". The States were in a weak position in claiming a legal basis for jurisdiction in terms of both international law and as a result of the High Court's decision in the *Seas and Submerged Lands* case. It was clearly felt (as detailed in Chapter Four) that attempts to create a formal treaty could lead to a collapse of the negotiations. The politics of Commonwealth - State relations drove these negotiations, the very real possibility that the Commonwealth could back out was present and the States were clearly afraid of the consequences of pushing the Commonwealth too far. As a result it is clear that there was no "agreement" signed by all parties which set out the parameters of the OCS in a similar form to the 1967 Petroleum Agreement.

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raised in the *Port Macdonnell* case. Bankes argues that "it is hard to escape the conclusion that the court would have been better placed to handle this problem had it had access to the terms of the agreement to which the legislation was purporting to give effect". N. Bankes, "Co-operative Federalism: Third Parties", 831. As this study shows, there was *no written* agreement.

Collaboration between the Commonwealth and States did not preclude the possibility of the central government acting unilaterally to reinforce and extend its position. In spite of constitutional paramountcy offshore, the interaction over the OCS shows that the central government may not be able to maximise its constitutional position, given the significance of the countervailing dynamic emerging from the political constitution. The examination of the "offshore sagas" of both Australia and Canada clearly shows that such processes can impose considerable political, if not economic costs, for unilateral action providing significant limits on central government action.<sup>52</sup>

Unilateral action involves a range of costs, the obvious economic factors associated with taking over responsibility for a range of activities as well as the more intangible political costs arising from antagonising the States by intervening in particular areas. A recognition of these costs was implicit in the correspondence between the State Premiers and the Fraser government over the "offshore problem" in Australia where the Prime Minister made it quite clear to the States that there would be no unilateral Commonwealth action over marine resources. Similar constraints were evident in Canada during the federal government's disputes with Nova Scotia and Newfoundland. Revenue sharing arrangements in the Canadian negotiations which favoured the provinces and the retention of state

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<sup>52</sup> See J. O. Saunders, *Managing Natural Resources in A Federal State*; P.H. Russell, "The Supreme Court and Federal-Provincial Relations: The Political Use of Legal Resources", *Canadian Public Policy*, XI, 2, (1985): 161-170; M. Crommelin, "Commonwealth Involvement in Environment Policy: Past, Present and Future", *Environment and Planning Law Journal* 4 (June 1987): 101-112.

jurisdiction in Australia illustrated the political limits on central government policy making. In utilising the politics of intergovernmental relations both Australian and Canadian Premiers took the opportunity to articulate and maintain pressure for a particular outcome different from that afforded them by the formal legal constitutional system

### **Federalism and the Offshore Constitutional Settlement: Explaining the Outcome**

Chapter One has drawn attention to the insights introduced by Rosenthal and Hoefler on the importance of the relationship between structural criteria (constitutional rules) imposed by the federal system on the interaction (behaviour) of officials.<sup>53</sup> It is this relationship which incorporates what Lucas has termed "the political constitution", the countervailing forces to increasing central power and authority. This study argues that the States have been able to utilise the various elements of their relationship with the Commonwealth to maintain their role in any settlement over the offshore. The significance of the States is premised from the constitutional recognition afforded them in the Australian constitution. Yet this recognition gives the States equally important political and administrative resources. The OCS derived, therefore, from the interaction between constitutional arrangements and institutional arrangements, shaped by rules emerging from the operation of these institutions, itself a key element of Australian federalism.

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<sup>53</sup> See also D.B Rosenthal and J. M. Hoefler, "Competing Approaches to the Study of American Federalism and Intergovernmental Relations", *Publius* 19 (Winter 1989): 1-23.

The processes leading to the OCS are therefore "representative of a set of interactions that is *supplementary* to the constitutional, financial or partisan political context of federal relations".<sup>54</sup> Agreements such as the OCS have different functions in a federal system. They provide a means of ordering arrangements where jurisdiction, resources and responsibility over policy are shared, or are complicated by changes in the nature of the policy area or subject to broader systemic variations. Intergovernmental agreements therefore reflect the impacts of the "extra vitamins" introduced by federalism, or intergovernmental interaction, into the policy process.<sup>55</sup> The effects of these vitamins, Painter suggests, are found in policy areas which have experienced increased intervention from the Commonwealth government. The political outcome over the offshore dispute which resulted in the OCS was bounded, but at the same time vitalised, by the constitutional as well as political aspects of federalism and is an example of the impact of these vitamins.

The emergence of the sectoral basis to the OCS is as much a reflection of the ability of the States to determine the agenda as it is of the Commonwealth influencing and controlling the implementation of the agreed arrangements, although again this phase did need the support of the various State governments. Although this study has argued that the States were influential in establishing the offshore settlement it is also clear that the Commonwealth maintained considerable control in several of the OCS sectors. Even where the

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<sup>54</sup> R.J.K. Chapman "Intergovernmental Forums and the Policy Process" in B. Galligan, (ed.) *Comparative State Policies*, (Melbourne, Longman Cheshire), 1988, 104. (Emphasis added).

<sup>55</sup> M. Painter, "Australian Federalism and the Policy Process: Politics with Extra Vitamins", *Politics*, 23, 2, (November 1988): 57-66.

States have been given responsibility under the OCS they have limited autonomy in policy making, a situation which reflects the realities of federalism offshore.

The delegation of authority to State agencies to administer and manage oil and gas developments reduced their flexibility in managing this sector.<sup>56</sup> There has been some concern that in some sectors, such as the regulation of ship-sourced marine pollution, the OCS arrangements have been amended to increase the power of the Commonwealth.<sup>57</sup> The implementation of fisheries arrangements has led to the division of "jurisdiction on the basis of individual stocks rather than the three mile limit" which has claimed to have increased the involvement of the Commonwealth in the practice of fisheries management.<sup>58</sup> The provision of roll-back for ship-sourced marine pollution and dumping of waste at sea has ensured that Commonwealth policy is implemented, although in this area the Commonwealth paramountcy involves its responsibilities under international treaties such as MARPOL, the London Dumping Convention or SPREP.

While acknowledging the importance of the Commonwealth in marine resources policy, it is equally important to recognise that implementation of the OCS agreed arrangements retained, and reinforced the role of the States. The States maintained their positions

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<sup>56</sup> R. Cullen, "Bass Strait Revenue Raising: A Case of One Government Too Many?", *Journal of Energy and Natural Resources Law*, 6 (1988): 213-247.

<sup>57</sup> M. Crommelin, "Commonwealth Involvement in Environmental Policy".

<sup>58</sup> A.J. Harrison, *The Commonwealth Government in the Administration of Australian Fisheries: A Sort of Mongrel Socialism* RAIPA National Monograph No.6 (Hobart, RAIPA, 1991): 97.

and influence on intergovernmental forums which became the main mechanism through which the OCS framework was implemented in each sector. Intergovernmental institutional arrangements such as the Premiers' Conference, or ministerial councils, standing or technical committees of officials with functional responsibilities, were of paramount importance in shaping the outcome of the offshore settlement. The consensus sought at these meetings and the search for collaborative outcomes served to define and constrain behaviour, and as such influenced intergovernmental interaction within these institutions.

The study of Australian federalism and the offshore to the 1990s reinforces the view that the States have been able to engage, and at times out-manoeuvre, the Commonwealth in policy "contests" which arose from the latter's intervention in this policy area.<sup>59</sup> A similar outcome can be observed following the involvement of the Commonwealth in land use (wilderness preservation and forestry) issues in the 1980s. These conflicts indicate that the States may be able to "bid up" claims in areas where the Commonwealth is judicially paramount. Claims for compensation for Commonwealth intervention are illustrative of the processes; such claims are based upon the fact that the States have "ownership and control of natural resources within State boundaries."<sup>60</sup> The bargaining over policy options and accommodation of the sometimes widely divergent views

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<sup>59</sup> C. Sharman introduced the notion of policy contests as important elements in Commonwealth - State relations in "Fraser, the States and Federalism", *The Australian Quarterly*, 52 (Autumn 1980): 9-19.

<sup>60</sup> M. Crommelin, "Commonwealth Involvement in Environment Policy": 110.

which arises in such cases highlight the importance of intergovernmental relations in determining the *outcomes* in the Australian system.

Commonwealth intervention in policy areas such as the offshore that have been the traditional concerns of the States give rise to several responses, including challenges to the validity of Commonwealth jurisdiction, the mobilisation of the electorate by focusing on the policy area as an issue of "states rights" and use of intergovernmental forums to check Commonwealth power. At times all three processes occur simultaneously and, as illustrated by the introduction of the OCS, are not mutually exclusive. Accommodation of the majority of the States' demands was achieved by intergovernmental negotiation where the States were able to assert their *political* claims. They gained a more favourable outcome than that afforded them by the *judicial* process by which the High Court had upheld the *Seas and Submerged Lands Act 1973* (Cwth).

Given that the States retain considerable economic, political and regulatory interests in policy areas such as the offshore means that, despite judicial decisions in favour of the Commonwealth, effective implementation of policy must rely on intergovernmental negotiation. Bargaining processes can mediate the "difficulties" arising from assertions of jurisdictional paramountcy by the Commonwealth.<sup>61</sup> With the entrenchment of the OCS in February 1983, the question of paramountcy diminished and the focus of dispute between the Commonwealth and the States shifted. The

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<sup>61</sup> Ibid.



attainment of a mutually satisfactory outcome over legal power offshore and the entrenchment of limits to the extent of Commonwealth jurisdiction in the coastal and territorial waters meant that the implementation of the OCS arrangements was inextricably bound to the federal character of the settlement. As a result of the concentration on the legislative "return" of jurisdiction to the States, other issues, such as the question of revenue sharing from oil and gas revenues, were put aside rather than being resolved.

A major issue is of course the extent to which the Commonwealth has maintained a controlling influence in marine resources policy despite the OCS's avowed commitment to "co-operative federalism". The question of jurisdiction offshore is therefore only one part of the mosaic of Australian federalism offshore. Claims over jurisdiction are important although any examination of such issues highlights the confusing meanings of Commonwealth powers, the extent of State extra-territorial competence given the concurrent nature of much of Commonwealth power and the extension of reach of powers such as the external affairs power.

Notwithstanding their original objections to the entry of the Commonwealth into fisheries policy, the view that the Commonwealth had some legitimate right was eventually supported by the States. The question of jurisdiction over offshore oil and gas was more unclear and, as a result, was the focus of much debate between the Commonwealth and the States, particularly between 1962 and 1979. In spite of the contradictory elements within the OCS, for example the tension between the commitment for a "co-operative federalism" within the agreed arrangements and the major brokerage role given to

the Commonwealth,<sup>62</sup> there is no doubt that Australian federalism offshore has changed markedly as a result of the OCS. It is equally clear that the States, while constrained in some sectors, are in a better position as a result of the settlement than they would have been if the Fraser government had chosen to implement the decision of the High Court in the *Seas and Submerged Lands* case.<sup>63</sup>

Overlapping responsibilities and duplication of functions related to these responsibilities may lead to a strengthening of all tiers of a federal system, not necessarily the destruction of one.<sup>64</sup> This introduces the defining (and therefore crucial) element of federalism into the analysis; if there was no separation between units of government as defined by jurisdiction and the system had become totally unified, there would be no need in theory<sup>65</sup> to establish intergovernmental agreements as simple administrative fiat would be sufficient. Wiltshire is correct in arguing that such agreements arise from the need to provide order in the system. However this ordering entrenches the system and makes it more probable that the States emerge as major actors in any intergovernmental regime.

A comparison between the 1967 Agreement and the OCS provides useful evidence of the impact of constitutional, political and legal parameters on intergovernmental interaction. The effect of the

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<sup>62</sup> Examples of this role include determining the timing of negotiations and the speed of implementation of the framework.

<sup>63</sup> R. Cullen, *Australian Federalism Offshore*, (1st ed.): 140.

<sup>64</sup> It must be recognised that such overlap and duplication may, in extreme cases, lead to economic and administrative inefficiencies.

<sup>65</sup> In practice of course intergovernmental relations are present even within unitary political systems such as the United Kingdom. See, for example R. A. W. Rhodes on centre-local government relations in *Beyond Westminster and Whitehall*.

comments of Chief Justice Barwick and Justice Windeyer in *Bonser's* case in 1969, and external factors led the political upheaval of the Gorton Bill in 1970. The upholding of the *Seas and Submerged Lands Act* 1973 by the High Court was to narrow the boundaries of intergovernmental interaction. This gave the States less room to manoeuvre in the mid 1970s than they had a decade earlier. Chapter Two detailed how even during the negotiations concerning the intergovernmental agreement over petroleum in the mid 1960s, the arena had been narrowed by the entry into force of the international *Convention on the Continental Shelf* in 1965 and the decision of the Canadian Supreme Court in the *British Columbia Reference* in 1967. The former event, particularly, had the effect of reinforcing the Commonwealth's claims over offshore hydrocarbons.

The interaction over the OCS shows that, in spite of the narrow band from which feasible alternatives to solve the offshore problem could be provided (limits recognised very clearly by the State officials), the States were able to gain politically what they had lost through the judgements of the High Court in the *Seas and Submerged Lands* case.<sup>66</sup> The OCS may have had the effect of modifying aspects of jurisdiction, but at the same time it is a product of the relationship between constitutional and political elements of a federal system. That this relationship is dynamic is shown in the implementation of each of the OCS<sup>67</sup> sectors.

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<sup>66</sup> Although of course the High Court judgement held, in effect, that the States had never had jurisdiction from low water mark.

<sup>67</sup> While it has been emphasised that the sectoral approach emerged following the election of the Hawke government and the review it undertook of the OCS it is highly probable that the Fraser government, had it remained in office, would have faced the same trends. The implementation of the OCS agreed arrangements was, as discussed in Chapter Four a further lengthy period, fraught with difficulties. The fanfare surrounding the launch of the OCS (deliberately, yet understandably) understated the complexity of the task of implementation.

## Conclusion

This study has placed the development of the OCS in the context of, and as a major outcome from, the interaction between constitutional, political and administrative elements of Australian federalism. While the offshore may be viewed at one level as simply an interesting and unique case study of the dynamics of intergovernmental relations,<sup>1</sup> an underlying premise of this study is that this policy area highlights important and more general aspects of Australian federalism. Examination of the development and implementation of the OCS shows that State governments are able to place political and administrative limits on attempts by the Commonwealth to expand its interests, even in areas where its constitutional power has been reinforced by the process of judicial review.

As earlier chapters have suggested that the States have been able to use the dynamic between elements of Australian federalism to reinforce their role and function in this policy area. It is such processes which make it more probable that the eventual outcome will reflect political and administrative rather than legal or judicial imperatives. Political and administrative federalism emerges, however, from a constitutional division of powers and responsibilities: Constitutional heads of power are important juridically, but may have greater impact as resources in intergovernmental interaction. As Russell argues

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<sup>1</sup> See T. Hannan, "Review of B. Galligan, O. Hughes and C. Walsh (eds.) *Intergovernmental Relations and Public Policy*," *Australian Journal of Political Science*, 27, 1 (March 1992): 156.

constitutional power should be viewed as a political resource just as popularity or a good international economic climate are resources for democratic politicians. . . . How governments use their constitutional gains or seek to overcome their losses depends on their political will and skill, and their other resources.<sup>2</sup>

As a result the State governments have a range of resources to utilise in intergovernmental interaction in policy areas such as the offshore. Jurisdictional responsibilities give the States political as well as legal resources and ensure that the politics of Commonwealth - State relations will be important in determining intergovernmental arrangements.

Since the States are political as well as legal entities they can use these resources to counter the expansion in the reach of Commonwealth power occurring through judicial review. The implementation of expanded Commonwealth powers carries considerable political costs. International treaties or conventions reinforce Commonwealth powers but do not reduce the interests of the States which are equally important in determining outcomes.

The separation between domestic and international policy imperatives in a federal system is increasingly an artificial dichotomy, as domestic agendas are rarely limited to domestic issues. The offshore saga shows how international treaties can be used as a means to pursue a particular domestic agenda; the empirical material shows, however,

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<sup>2</sup> P. H. Russell, "The Supreme Court and Federal-Provincial Relations: The Political Use of Legal Resources" *Canadian Public Policy*, XI, 2 (1985): 165.

that this did not limit or preclude the States from asserting their view of the national interest.<sup>3</sup> The impact of Commonwealth legislation giving effect to international agreements cannot be understated, although concentrating on the Commonwealth's actions tends to understate the ability of the States to respond, including launching bids for financial compensation, to mediate the impact of the Commonwealth's policy.<sup>4</sup>

Intergovernmental arrangements over the offshore reflect the importance of the States' constitutional claims and their longstanding expertise in resource management. The development of regulatory regimes has made the States' the major focus for resource users, although these groups may also interact with the Commonwealth.<sup>5</sup> While it is possible - as in the case of the Australian tuna fisheries - for an official in Canberra to "manage" particular fisheries,<sup>6</sup> the States have integral roles in the enforcement of Commonwealth laws and regulations. Even in the case of foreign fisheries undertaken in Australian waters and regulated by Commonwealth laws, Commonwealth officials are based in, and given logistic support by, State fisheries departments.

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<sup>3</sup> The States demands for consultation over the implementation of international treaties has remained a major issue in Australia since the 1970s; reappearing in the new federalism initiative of 1990-91 as part of the agenda of the Special Premiers Conference and in the Intergovernmental Agreement on the Environment (IGAE) of February 1992.

<sup>4</sup> H. Collins, "Federalism, The States and International Affairs: A Political Science Perspective" In B. Galligan (ed.) *Australian Federalism* (Melbourne: Longman Cheshire, 1989): 185-186.

<sup>5</sup> See M. Haward, Marine Resource Policy in Australia: The Policy Environment, The Policy Process and the Issue Community", *Maritime Studies*, 26 (June 1986): 12-16.

<sup>6</sup> In theory without necessarily getting their feet wet, although in practice such officers rely upon observers (who may be employed through State agencies) to ensure compliance with Commonwealth regulations.

### Federalism and the Offshore Constitutional Settlement

The OCS resulted from the dissonance between the Australian States' policy objectives and the increased reach of the Commonwealth's constitutional heads of power. This study shows that although the Commonwealth has expanded its interests in a range of offshore areas since the second world war (a process which gives the expansion of central power the most "visible gloss" of policy development) the States still remain important, and in many aspects the most significant, actors in this policy area.<sup>7</sup> Intergovernmental negotiations over the offshore in Australia, as in Canada, illustrate, therefore, the importance of what has been termed the "political constitution" - the political and administrative processes which pose real limits on the extent to which the central government can implement its gains through judicial review of disputes over jurisdiction.<sup>8</sup> This study reinforces Rosenthal and Hoefler's argument that constitutional structure creates "rules" under which intergovernmental relations develop and are maintained. These "rules" reinforce the political, as opposed to the judicial, limits on the expansion of Commonwealth heads of power.<sup>9</sup>

Although this study has emphasised the importance of the less visible glosses of intergovernmental interaction it is important to recognise that the constitutional structure affects both levels of government. Just as the States were successful in constraining various Commonwealth

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<sup>7</sup> Even in areas such as oil and gas policy - an area which Cullen correctly cites as dominated by Commonwealth policy directives - the States are crucial actors in day to day decision making.

<sup>8</sup> A. R. Lucas "Harmonization of Environmental Policies" in J. O. Saunders, (ed.) *Managing Natural Resources in A Federal State: Essays from the Second Banff Conference on Natural Resources Law*, (Toronto, Carswell 1986): 35.

<sup>9</sup> D.B Rosenthal and J. M. Hoefler, "Competing Approaches to the Study of American Federalism and Intergovernmental Relations", *Publius* 19 (Winter 1989): 1-23.

governments over the assertions of jurisdiction offshore, the States themselves were well aware of the presence of implicit limits to, or non-negotiable items in, the negotiations over the offshore. This provides an explanation why the States were reluctant to push for a re-evaluation of the revenue sharing formula over offshore oil. The majority of States were more concerned with retaining jurisdiction over the "three mile limit" and would not support claims which would unravel commitments made by the Commonwealth. Thus, as shown in the preceding chapters the Commonwealth, in spite of entrenching a legislative base for State jurisdiction, was able to retain a major role in the offshore. The rules arising from the structure of relations (creating Lucas' "political constitution") over the division of powers and responsibilities allowed the Commonwealth to maintain its influence offshore, yet still avow its commitment to co-operative federalism through the OCS.

In maintaining control over the proclamation of its legislation - the crucial elements of the complementary legislation which formed the keystones of the OCS - the Commonwealth effectively controlled the policy agenda.<sup>10</sup> This control carried through in the implementation of some of the OCS packages. As the intergovernmental arrangement relating to oil and gas approximates Sawyer's model of "organic federalism", with the States "mere administrators"<sup>11</sup> the influence of the Commonwealth raises interesting questions in relation to the proposition advanced in this study that the OCS emerged from the articulation of State interests in offshore policy. It is certainly the case that a period in which the Commonwealth expanded its legislative and

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<sup>10</sup> This control almost came unstuck prior to the March 1983 federal election, resulting in the rapid, and rather controversial, decision to proclaim the *Coastal Waters (State Title) Act 1980* during the election campaign.

<sup>11</sup> G. Sawyer, *Modern Federalism* (London: Watts, 1969).



administrative activity after the Second World War increased the salience of the offshore areas and the management of marine resources. As shown in Chapter Three, the increase in Commonwealth involvement was buttressed by changes in the international law of the sea, yet this did not reduce the States' interests or legislative and administrative responsibilities.

In each of the administrative regimes established under the OCS the Commonwealth retained a major role, although its influence is most sharply drawn in the offshore oil and gas sector. While State Ministers (known as Designated Authorities) are responsible for determining exploration permits and following successful strikes confirming production licenses, the Commonwealth retains a major role in oil and gas policy. It is the Commonwealth which determines pricing policy, royalties and downstream taxation arrangements. Thus the Commonwealth controls the pattern of revenue sharing with the States, with the OCS oil and gas arrangements described as a national scheme administered by the States.<sup>12</sup>

The provision of roll-back clauses allow the States the right to legislate under the OCS arrangements; if, however, the States wish to enact such legislation the Commonwealth's international obligations must be maintained. The Commonwealth has retained an important role in the regulation of marine pollution as sea dumping arrangements need the Commonwealth Minister's approval.<sup>13</sup> The States' tardiness in

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<sup>12</sup> See R. Cullen, *Federalism in Action: The Australian and Canadian Offshore Oil and Gas Disputes*, (Sydney: Federation Press, 1990): 221.

<sup>13</sup> Dumping of wastes will be phased out by 1995 following amendments to the London Dumping Convention. The development of the marine pollution regime under the OCS show the influence of Australia's international agreements as practices have been modified by the introduction of SPREP and the Treaty of Raratonga (the treaty establishing the South Pacific Nuclear Free Zone).

enacting the required complementary legislation resulted in the Commonwealth passing amendments in 1986 to the *Protection of the sea (Prevention of Pollution from Ships) Act 1981*, amendments which have been considered by some commentators to have altered the intent of the OCS.<sup>14</sup>

The States maintain an important role under the OCS fisheries regime, although again the Commonwealth's influence cannot be understated. In determining the classification of fisheries, the Commonwealth controlled the extent, and agenda, of the introduction of the OCS. These arrangements have facilitated a shift away from jurisdiction to stock-based management which has increased the Commonwealth's day to day involvement in fisheries management.<sup>15</sup>

The joint management arrangements and the success of the work of the intergovernmental institutions such as the Great Barrier Reef Marine Park Authority (GBRMPA) and the Great Barrier Reef Ministerial Council contrasts with the two decades of disputes between the Commonwealth and Queensland described in earlier chapters. The Great Barrier Reef Marine Park is seen, justifiably, as a model of intergovernmental cooperation in the management of marine protected areas.<sup>16</sup> Indeed this is one area where the cooperation enshrined in the OCS has been achieved, and where, at least on the surface, the interests of both the Queensland and Commonwealth

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<sup>14</sup> M. Crommelin, "Commonwealth Involvement in Environment Policy: Past Present and Future" *Environment and Planning Law Journal*, 4, (June 1987): 101-112.

<sup>15</sup> A.J. Harrison, *The Commonwealth Government in the Administration of Australian Fisheries: A Sort of Mongrel Socialism* RAIPA National Monograph No.6 (Hobart, RAIPA, 1991).

<sup>16</sup> L. K. Kriwoken, "Great Barrier Reef Marine Park: Intergovernmental Relations" *Marine Policy* (September 1991): 349-362.

governments have been integrated into an intergovernmental regime. As has been noted, the establishment of this intergovernmental regime has not been without problems; there have been difficulties in achieving harmony between State and Commonwealth agencies and in coordinating Commonwealth and State legislation. Although some differences have arisen in management within the marine park and on terrestrial areas adjacent to the reef,<sup>17</sup> GBRMPA has generally succeeded in moderating these differences.

The Commonwealth's involvement in each of the OCS regimes is an important factor in assessing the validity of the proposition underpinning this study that this intergovernmental agreement reflects the States' ability to articulate their responsibilities and interests, therefore limiting the Commonwealth's ability to act unilaterally. Although there is sufficient evidence to suggest that the Commonwealth's involvement has increased rather than decreased this does not in itself limit the utility of the argument that the States remain important actors offshore. The analysis of Australian federalism offshore and the Offshore Constitutional Settlement has indicated that each of the elements which reinforce the processes of federalism may in fact favour one or other level of government at any particular point in time yet pose important limits on each unit of government. As a result the OCS emerged from the evolution of Australian federalism offshore since 1901, both part of and subject to the ongoing dynamic underpinning policy making in federal systems. Thus the States were able to counter the decision of the High Court in the *Seas and Submerged Lands* case and retain considerable influence in offshore policy in spite of reinforcement of Commonwealth powers

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<sup>17</sup> Ibid.

### The OCS and the Future

The OCS agreement emerged following intense negotiations and was seen as a flagship for the new federalism by the Fraser government. In charting a course for less confrontation in Commonwealth-State relations much was expected from the OCS, with the sea-worthiness of the arrangements being immediately tested. The election of the Hawke government, with the ALP formally committed to overturning the OCS and implementing the outcome of the *Seas and Submerged Lands* case, led several commentators to forecast a stormy passage. The Hawke government, embroiled in a major struggle with the States over Commonwealth intervention in South West Tasmania and the Daintree - Wet Tropics region in Queensland, was less committed to overturning arrangements which were working effectively. Given that the OCS enabled the Commonwealth to maintain its commitments to a range of international agreements, and allowed the Commonwealth to develop particular policy objectives, it was not surprising that the Hawke government retained the OCS. Although the complex and untried legislative anchor for the OCS was the focus of considerable debate among constitutional lawyers, the political consequences of a repeal of the *Coastal Waters (State Titles) Act 1980* made it unlikely that the settlement would be scuttled. The Hawke governments' support for the OCS, in the face of some criticism from within the ALP, reduced the possibility of the dispute over the offshore dragging into its fourth decade.

Issues concerning Australian coastal and oceans policy have emerged more forcefully in the late 1990s as the problems of marine pollution and use of the coastal zone have led to calls for greater government action to combat these problems. The OCS framework provides a basis

for an intergovernmental response to this emerging policy agenda. An attempt to increase the Commonwealth's influence in coastal zone management, lapsed in 1990. It is possible that the OCS will provide a mechanism for collaboration over coastal zone policy<sup>18</sup> in which the States' interests and responsibilities are recognised. This study has established that both levels of governments have significant interests in marine policy with intergovernmental agreements such as the OCS reflecting the inherently federal character of Australian public policy making.

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<sup>18</sup> M. Haward and A. Bergin. "Australian Intergovernmental Relations and Coastal Zone Management" in O.T. Magoon, H. Converse, V. Tippie, L.T. Tobin and D. Clark (eds) *Coastal Zone 91: Proceedings of the Seventh Symposium on Coastal Zone Management* (New York: ASCE, 1991): 737-751.

## Appendix One

### The 1967 Petroleum Agreement

**AGREEMENT RELATING TO THE EXPLORATION FOR, AND  
THE EXPLOITATION OF, THE PETROLEUM RESOURCES, AND  
CERTAIN OTHER RESOURCES, OF THE CONTINENTAL SHELF  
OF AUSTRALIA AND OF CERTAIN TERRITORIES OF THE  
COMMONWEALTH AND OF CERTAIN OTHER SUBMERGED  
LAND.**

THIS AGREEMENT is made the sixteenth day of October, One thousand nine hundred and sixty-seven, Between THE GOVERNMENT OF THE COMMONWEALTH OF AUSTRALIA (in this Agreement called "the Commonwealth Government") of the first part, THE GOVERNMENT OF THE STATE OF NEW SOUTH WALES of the second part, THE GOVERNMENT OF THE STATE OF VICTORIA of the third part, THE GOVERNMENT OF THE STATE OF QUEENSLAND of the fourth part, THE GOVERNMENT OF THE STATE OF SOUTH AUSTRALIA of the fifth part, THE GOVERNMENT OF THE STATE OF WESTERN AUSTRALIA of the sixth part and THE GOVERNMENT OF THE STATE OF TASMANIA of the seventh part (each of the parties of the second, third, fourth, fifth, sixth and seventh parts being in this Agreement referred to as a "State Government" and the expression "the State Governments" in this Agreement meaning, unless the contrary intention appears, all those State Governments).

WHEREAS in accordance with international law Australia as a coastal state has sovereign rights over the continental shelf beyond the limits of Australian territorial waters for the purpose of exploring it and exploiting its natural resources:

AND WHEREAS Australia is a party to the Convention on the Continental Shelf signed at Geneva on the twenty-ninth day of April, One thousand nine hundred and fifty-eight, in which those rights are defined:

AND WHEREAS the exploration for and the exploitation of the petroleum resources of submerged lands adjacent to the Australian coast would be encouraged by the adoption of legislative measures applying uniformly to the continental shelf and to the sea-bed and subsoil beneath territorial waters:

AND WHEREAS the Governments of the Commonwealth and of the States have decided, in the national interest, that, without raising questions concerning, and without derogating from, their respective constitutional powers, they should co-operate for the purpose of ensuring the legal effectiveness of authorities to explore for or to exploit the petroleum resources of those submerged lands:

AND WHEREAS the Governments of the Commonwealth and of the States have accordingly agreed to submit to their respective Parliaments legislation relating both to the continental shelf and to the sea-bed and subsoil beneath territorial waters and have also agreed to co-operate in the administration of that legislation:

NOW IT IS HEREBY AGREED as follows:—

#### PART I.—PRELIMINARY.

1.—(1.) Subject to sub-clause (2.) of this clause, the provisions of this Agreement shall take effect upon the signature of this Agreement on behalf of all of the parties.

Operation of  
Agreement.

(2.) Except as provided in sub-clause (3.) of this clause, Part III. of this Agreement shall not have any force or effect in relation to the adjacent area of a State until the Acts of the Parliaments of the Commonwealth and of the States contemplated by clauses 3, 4 and 5 have come into operation.

(3.) Part III. of this Agreement may by agreement between the Commonwealth Government and a State Government be brought into force and effect in relation to the adjacent area of the State when the Acts of the Parliaments of the Commonwealth and of the State contemplated by clauses 3, 4 and 5 have come into operation in relation to that adjacent area.

**2.—(1.) In this Agreement, unless the contrary intention appears—** Definitions.

“clause” means clause of this Agreement;

“Commonwealth” means Commonwealth of Australia;

“Government” means a Government a party to this Agreement and the expression “the Governments” means all those Governments;

“State” means one of the States aforesaid and the expression “the States” means all those States;

“the Common Mining Code” means, in relation to the adjacent area of a State, the Commonwealth Mining Code and the State Mining Code of that State in their application to that adjacent area;

“the Commonwealth Mining Code” means Part III. of the Commonwealth Act designated the Petroleum (Submerged Lands) Act and the Commonwealth Acts designated the Petroleum (Submerged Lands) (Royalty) Act, the Petroleum (Submerged Lands) (Exploration Permit Fees) Act, the Petroleum (Submerged Lands) (Production Licence Fees) Act, the Petroleum (Submerged Lands) (Pipeline Licence Fees) Act and the Petroleum (Submerged Lands) (Registration Fees) Act that are contemplated by clauses 3 and 5;

“the Commonwealth Minister” means the Minister of State of the Commonwealth for the time being responsible for the administration of the Commonwealth Mining Code and includes a Minister or other member of the Federal Executive Council who is for the time being acting on behalf of that Minister; and

“the State Mining Code” means Part III. of the relevant State Act and any other relevant State Act or Acts that is or are contemplated by clauses 4 and 5.

(2.) A reference in this Agreement to an Act of the Commonwealth or of a State shall, except where the contrary intention appears, be read as a reference to that Act as from time to time amended in accordance with this Agreement.

(3.) Where a word, expression or reference that is defined or for which an interpretation is given in an Act of the Parliament of the Commonwealth or of a State contemplated by this Agreement is used in this Agreement, the word, expression or reference shall, unless the context otherwise requires, have for the purposes of this Agreement the meaning or interpretation attributed or given to it by those Acts.

## PART II.—THE COMMONWEALTH AND STATE LEGISLATION.

Submission of  
Commonwealth  
Bills.

3. The Commonwealth Government will submit to the Parliament of the Commonwealth Bills for Acts that contain, apart from any formal or transitional provisions, provisions to the effect of the draft Bills set out in the First Schedule to this Agreement.

Submission of  
State Bills.

4. Each State Government will submit to the Parliament of the State a Bill for an Act, or Bills for Acts, that, apart from any formal or transitional provisions, contains or contain provisions to the effect of the draft Bill set out in the Second Schedule to this Agreement.

Passage of  
Bills.

5. Each Government will use all reasonable endeavours to secure the passing and the coming into operation of the Bill or Bills introduced by it.

Amendments.

6.—(1.) Except in accordance with an agreement between the Commonwealth Government and the State Governments, a Government will not submit to its Parliament a Bill for an Act that would either—

- (a) amend or repeal an Act that is contemplated by the preceding provisions of this Part; or
- (b) in any material respect affect the scheme of the legislation that is contemplated by this Agreement.

(2.) The last preceding sub-clause does not apply to a Bill for an Act in so far as the effect of its provisions would be formal or transitional.

Regulations.

7. Except in accordance with an agreement between the Commonwealth Government and the State Governments—

- (a) regulations under an Act that is contemplated by the preceding provisions of this Part (other than formal or transitional regulations) in relation to the Commonwealth Mining Code or the State Mining Code shall not be made, amended or repealed; and
- (b) regulations under any Act of the Parliament of the Commonwealth or of a State that will affect in any material respect the scheme of the legislation that is contemplated by this Agreement shall not be made.

Legislation in  
respect of  
External  
Territories.

8. The provisions of the last two preceding clauses do not apply to legislation with respect to or in its application to a Territory under the authority of the Commonwealth not forming part of the Commonwealth.

## PART III.—ADMINISTRATION OF THE COMMON MINING CODE.

Administration  
of the Common  
Mining Code.

9. The Common Mining Code in respect of the adjacent area of a State shall be administered by the person who is the Designated Authority for the purpose of the Commonwealth Mining Code and of the State Mining Code in respect of that adjacent area.

Assistance  
between  
Governments.

10. Where in special circumstances a Government requests another Government to provide assistance in implementing the legislation contemplated by this Agreement, the other Government will, so far as it is reasonably able to do so, provide the assistance.



11.—(1.) Except in so far as the Commonwealth Government has informed the State Government that it is not necessary to do so, a State Government will consult the Commonwealth Government—

State  
Consultation  
with  
Commonwealth.

- (a) before a permit, licence, pipeline licence, access authority or special prospecting authority under the Common Mining Code in relation to the adjacent area of that State is granted, renewed or varied;
- (b) before approval is given to any transfer of a permit, licence, pipeline licence or access authority that has been so granted; or
- (c) before approval is given to any instrument by which a legal or equitable interest in or affecting an existing or future permit, licence, pipeline licence or access authority (being a permit, licence, pipeline licence or access authority under the Common Mining Code in relation to the adjacent area of that State) is or may be created, assigned, affected or dealt with, whether directly or indirectly.

(2.) The Commonwealth Government will, in considering a matter referred to in the last preceding sub-clause, take into account the following Commonwealth responsibilities under the Constitution, namely—

- (a) trade and commerce with other countries and among the States, including navigation and shipping;
- (b) external affairs;
- (c) taxation, including taxes in the nature of duties of customs and excise;
- (d) defence;
- (e) lighthouses, lightships, beacons and buoys;
- (f) fisheries in Australian waters beyond territorial limits; and
- (g) postal, telegraphic, telephonic and other like services,

and will, with all due expedition, give a decision accordingly.

(3.) In coming to a decision, the Commonwealth Government will take into account only matters reasonably related to the responsibilities specified in the last preceding sub-clause.

(4.) When giving a decision that is not consistent with the action proposed by the State Government, the Commonwealth Government will specify the Commonwealth responsibility or responsibilities with respect to which the decision is given and, unless it is considered by the Commonwealth Government undesirable in the national interest to do so, inform the State Government of the grounds of the decision.

(5.) A State Government will accept, and will ensure that effect is given to, a decision of the Commonwealth Government with respect to a responsibility of the Commonwealth taken into account as aforesaid.

12. Each State Government will, in the administration of the Common Mining Code in relation to the adjacent area of the State, take all reasonable steps to secure compliance with the obligations of Australia under the Convention.

Convention  
on the  
Continental  
Shelf.

13. A State Government will, when so requested by the Commonwealth Government, ensure that copies of the returns, reports, maps, notifications, logs, records and the like material and adequate portions

Provision of  
Returns, etc.

of all cores, cuttings and samples that are received by it or its authorities by virtue of the operation of the Common Mining Code in relation to the adjacent area of the State are, as soon as reasonably practicable after receipt, forwarded to the Commonwealth Government.

**Refining and  
Use of  
Petroleum.**

14.—(1.) A condition may be included in a permit or licence under the Common Mining Code in its application to the adjacent area of a State to the effect that the permittee or licensee shall comply with any requirement of the Designated Authority administering the Common Mining Code that all or any of the petroleum produced pursuant to the permit or licence shall be refined in the State, or, in the case of petroleum in a gaseous state, shall be used, before or after processing, within the State.

(2.) A requirement referred to in sub-clause (1.) of this clause shall not be made unless there has been consultation between the Commonwealth Minister and the appropriate Minister of the State concerning the requirement and the Ministers are in agreement that the requirement should be made.

(3.) When consulting, the Commonwealth Minister and the State Minister shall consider the interests of the State and of the Commonwealth generally and the Commonwealth Minister shall not be entitled to withhold his agreement to the making of the requirement unless it is reasonable in the national interest to do so having regard to the economic and efficient exploitation, processing and use of the petroleum resources to which the requirement would relate.

**Non-availability  
of Areas.**

15.—(1.) If, for a reason reasonably related to a responsibility of the Commonwealth specified in sub-clause (2.) of clause 11, the Commonwealth Government so requests, an area or areas of the adjacent area of a State will for the time being be made not available for the granting therein of permits, licences or pipeline licences under the Common Mining Code.

(2.) When making a requirement for the purposes of sub-clause (1.) of this clause, the Commonwealth Government will specify the Commonwealth responsibility or responsibilities with respect to which the requirement is made and, unless it considers that it is undesirable in the national interest to do so, inform the State Government of the grounds upon which the requirement is made.

**Unit  
Development.**

16.—(1.) If a petroleum pool extends or is reasonably believed to extend from an adjacent area of a State or Territory into—

- (a) lands of the State or Territory not being part of the adjacent area of that State or Territory;
- (b) lands of an adjoining State or Territory, not being part of the adjacent area of that State or Territory; or
- (c) the adjacent area of an adjoining State or Territory,

the Designated Authority or Authorities concerned and, where appropriate, the other petroleum mining authority or authorities involved shall consult concerning the exploitation of the petroleum pool.

(2.) Directions for the exploitation of the petroleum pool in accordance with the provisions in relation to unit development of the Common Mining Code or of the Commonwealth Mining Code in its application with respect to a Territory shall not be given to a licensee until after a

scheme for the exploitation of the petroleum pool has been agreed upon or approved by the relevant authorities or otherwise than in accordance with the scheme so agreed upon or approved.

17. Where, for the purpose of conveying petroleum produced from the adjacent area of a State or Territory, the Designated Authority in respect of the adjacent area has granted, or proposes to grant, a pipeline licence in respect of a pipeline that extends, or will extend, to the boundary between the adjacent area and an adjoining adjacent area, the Designated Authority in respect of that adjoining adjacent area shall accord all appropriate and reasonable consideration and treatment to an application for the grant of a pipeline licence to enable the pipeline to be continued across that adjoining adjacent area.

Pipeline Licence  
over adjoining  
Adjacent Area.

18.—(1.) A direction under the Common Mining Code that is inconsistent with the regulations made in relation thereto shall not be given and an exemption from compliance with the conditions of a permit, licence, pipeline licence, access authority or special prospecting authority shall not be granted by a Designated Authority unless there has been consultation between the Commonwealth Minister and the appropriate State Minister or their delegates concerning the proposed direction or exemption.

Directions and  
Exemptions.

(2.) Consultation as provided for by sub-clause (1.) of this clause is not required—

- (a) in cases concerning which the Commonwealth Minister has informed the appropriate State Minister that he does not consider consultation to be necessary; or
- (b) in a case of such urgency that consultation is not reasonably practicable.

(3.) The Designated Authority shall, as soon as reasonably practicable after a direction or an exemption referred to in sub-clause (1.) of this clause has been given or granted, whether or not following consultation in accordance with the sub-clause, give a notice in writing accordingly to the Commonwealth Minister together with particulars of the direction or exemption.

19.—(1.) After the coming into force of the Common Mining Code in relation to the adjacent area of a State, royalties received in respect of petroleum produced from that adjacent area shall, subject to sub-clause (2.) of this clause, be shared as follows—

Sharing of  
Royalties.

- (a) as to so much as is royalty, not being over-ride royalty, payable at a rate that does not exceed ten per centum of the value at the well-head of the petroleum in respect of which royalty is payable—four-tenths shall be allocated to the Commonwealth and the remaining six-tenths shall be allocated to the State; and
- (b) any royalty consisting of over-ride royalty in addition to the royalty referred to in paragraph (a) of this sub-clause shall be allocated to the State.

(2.) If the rate at which royalty is payable under a licence includes over-ride royalty and that rate is reduced by the Designated Authority in accordance with the relevant provisions of the Common Mining Code and of the next succeeding clause, the royalties received at the lower rate so fixed shall for the purposes of the operation of paragraphs (a) and

(b) of sub-clause (1.) of this clause be deemed to be composed of royalty other than over-ride royalty and of over-ride royalty in the same respective proportions as those that comprised royalty other than over-ride royalty and over-ride royalty before the reduction.

(3.) Any additional amount received by reason of late payment of royalty shall be allocated between the Commonwealth and the State in the same respective proportions as the royalty in respect of which the amount is payable is to be allocated in accordance with the preceding sub-clauses of this clause.

Reduction of  
Royalty.

20. The rate at which royalty is payable in respect of petroleum recovered from a well in the adjacent area of a State shall not be reduced by the Designated Authority except by agreement between the Commonwealth Minister and the appropriate Minister of the State.

Determination  
of Value  
for Royalty.

21. The Designated Authority shall consult the Commonwealth Minister before exercising the power under the Common Mining Code to determine, otherwise than by agreement with the permittee or licensee, the value of any petroleum.

Moneys other  
than Royalties.

22. As between the Commonwealth and the State, the State shall be entitled to the benefit of all moneys, other than royalties, payable under the Common Mining Code in relation to the adjacent area of the State, including moneys paid in respect of the grant of a permit or licence over a block or blocks within the adjacent area of the State with respect to which a permit or licence was previously in force but which has or have again become available for the grant of a permit or licence.

#### PART IV.—GENERAL PROVISIONS.

Governments  
to confer.

23. The Commonwealth Government and the State Governments will confer from time to time concerning the operation and administration of the legislation of the Parliaments of the Commonwealth and of the States contemplated by this Agreement and concerning any other matters that may arise out of or in connexion with this Agreement.

Commonwealth  
and State  
Operations.

24.—(1.) This Agreement shall not affect any right of the Commonwealth or of a State, by itself or by an authority or corporation on its behalf, in an adjacent area to carry on petroleum mining operations.

(2.) Where the Commonwealth Government or a State Government proposes itself, or by an authority or corporation on its behalf, to carry on petroleum mining operations in an adjacent area, the State Government and the Commonwealth Government will confer in relation to the proposed operations and, in the case of proposed operations by or on behalf of a State Government, the provisions of sub-clauses (2.), (3.), (4.) and (5.) of clause 11 shall, with appropriate modifications, apply to the State Government and the Commonwealth Government as if the carrying on of the proposed operations were a matter referred to in sub-clause (1.) of that clause.

(3.) A Government by or on behalf of which petroleum mining operations are carried on in an adjacent area shall ensure, as far as appropriate and reasonably practicable, that those operations are carried on in conformity with this Agreement and the Common Mining Code

and that all acts and things relating or incidental to those operations shall be done which the Common Mining Code, if it applied, would require to be done.

(4.) If petroleum is produced from the adjacent area of a State by the Commonwealth Government or a State Government or by an authority or corporation on behalf of either, the Government concerned shall ensure that the share of the other Government under paragraph (a) of sub-clause (1.) of clause 19 to the moneys that would be payable by a private producer as a permittee or licensee in respect of the petroleum is accorded to the State or to the Commonwealth, as the case may be.

(5.) In this clause "petroleum mining operations" means—

- (a) prospecting for petroleum;
- (b) recovering petroleum;
- (c) constructing and operating pipelines; and
- (d) doing all other things incidental thereto.

25.—(1.) This Agreement shall not be capable of being varied or revoked or of being determined by any Government except by agreement Variation, etc., of Agreement.  
between all of the Governments for the time being parties thereto.

(2.) The last preceding sub-clause shall not prejudice the right of any Government to determine this Agreement in relation to a Government that is in default thereunder.

26. The Governments acknowledge that this Agreement is not intended to create legal relationships justiciable in a Court of Law but declare that the Agreement shall be construed and given effect to by the parties in all respects according to the true meaning and spirit thereof. Construction and Effect of Agreement.

## Appendix Two

### The OCS Agreed Arrangements

#### **Extension of the legislative powers of the States in and in relation to coastal waters**

The Commonwealth Parliament will pass legislation, based on section 51 (38) of the Constitution, to give each State the same powers with respect to the adjacent territorial sea (including the seabed) as it would have if the waters were within the limits of the State.

The legislation will also give each State powers outside the territorial sea in respect of port-type facilities, underground mining extending from land within a State, and fisheries. The power with respect to fisheries will apply to fisheries that, under an arrangement to which the Commonwealth is a party, are to be managed in accordance with the laws of the State concerned, under the offshore fisheries scheme described below.

The status of the territorial sea under international law is to be expressly preserved. Also, savings provisions are to be included:

- to safeguard existing State extra-territorial powers in the offshore area;
- to ensure that laws of the Commonwealth that apply in the territorial sea prevail over any inconsistent State law in accordance with the paramountcy given to Commonwealth laws under section 109 of the Constitution.

The intended use, for the first time since federation, of section 51 (38) of the Constitution is of considerable significance for federal relations as its exercise requires the request or concurrence of the Parliaments of the States concerned. All States have agreed to pass Acts requesting the Commonwealth legislation. A copy of the Victorian Bill is in the accompanying booklet, *Offshore Constitutional Settlement—Selected Statements and Documents* 1978–79.

#### **Vesting in the States of the title to seabed beneath the territorial sea**

The Commonwealth Parliament will pass legislation to vest in each State proprietary rights and title in respect of the seabed of the adjacent territorial sea.

This grant of proprietary rights and title will both support the extension of the powers of the States in the territorial sea and provide an assurance to the States that the arrangements relating to the territorial sea will have permanency and stability.

As in the case of the 'Powers' legislation, the status of the territorial sea under international law is to be expressly preserved. Also, it will be necessary to except from the grant any seabed owned or used by the Commonwealth or by a Commonwealth authority for a specific Commonwealth purpose at the time of the grant. In addition, the Commonwealth legislation will reserve the Commonwealth's right to use the seabed for such national purposes as:

- defence
- cables
- navigational aids
- quarantine

### **Amendment of the Seas and Submerged Lands Act 1973**

Consequential amendments will be made to the *Seas and Submerged Lands Act 1973* to ensure that State laws passed under the other legislation will not be invalidated by that Act.

### **The area involved**

The above legislation—and also the petroleum and fisheries arrangements referred to below—will be limited to a territorial sea of 3 miles breadth, irrespective of whether Australia subsequently moves to a territorial sea of 12 miles.

On the other hand, the baselines from which the territorial sea will be measured will be drawn in a way that takes advantage of the international principles authorising the drawing of 'straight baselines' where the coast is deeply indented or fringed by islands, and of closing lines where bays are not more than 24 miles wide. Thus 'straight baselines' will be used to enclose the waters of Investigator Strait adjacent to South Australia. The 'internal waters' on the landward side of these lines will be included in the grants made by the legislation. The result will be to enlarge the area in which the States will enjoy the benefits of the legislation.

The baselines to be adopted are being prepared in close consultation with the States and will be promulgated in due course under the *Seas and Submerged Lands Act 1973*.

### **Offshore petroleum arrangements outside the 3 mile territorial sea**

These will be regulated by Commonwealth legislation alone, consisting of an amended Commonwealth Petroleum (Submerged Lands) Act. Day-to-day administration will continue to be in the hands of the 'Designated Authority' appointed for the 'adjacent area' of each State—that is, the State Minister—and State officials. The existing mining code will be retained and existing permits and licences will not be affected.

However, the legislation will establish for the first time a statutory Joint Authority for each adjacent area consisting of the Commonwealth Minister and the State Minister (Commonwealth-Victoria Offshore Petroleum Joint Authority, and so on). The Joint Authorities will be concerned only with major matters arising under the legislation including:

- determination of the areas to be open for applications for permits;
- the grant and renewal of exploration permits and production licences;
- approval of instruments creating interests in permits or licences;
- determination of permit or licence conditions governing the level of work or expenditure.

In the event of disagreement within a Joint Authority the view of the Commonwealth Minister is to prevail.

Having regard to the remoteness of Western Australia and its other special circumstances, special conditions were agreed in its case. A copy of the agreement is in the accompanying booklet, *Offshore Constitutional Settlement—Selected Statements and Other Documents 1978–1979*. However, Commonwealth views based on the national interest are still to prevail in the Joint Authority, as in the case of other States.

Summing up, the new arrangements will ensure that:

- the national interest in offshore petroleum activities can be asserted;
- the valuable role of the States is continued;
- dislocation of ongoing projects is avoided.

The present arrangements for the sharing of royalties between the States and the Commonwealth will be retained.

### **Offshore petroleum arrangements inside the outer limit of the 3 mile territorial sea**

This will be regulated by State legislation alone, administered by State authorities, in recognition of the fact that local matters within the territorial sea are primarily matters for the States. However, the common mining code will be retained as far as practicable, and existing permits and licences, and appropriate arrangements will be made for 'transitioning' existing permits to the extent that they fall within the outer limit of the territorial sea.

### **Offshore mining for other minerals**

Arrangements for the mining of offshore minerals other than petroleum will be the same as for offshore petroleum.

Commonwealth and State legislation embodying a common mining code will be needed to implement the arrangements. Arrangements will also be made for sharing royalties.



## Offshore fisheries

The arrangements existing to date involve a division of legislative responsibilities under which, generally speaking, State laws are applied inside 'territorial limits' consisting of the outer limit of the 3 mile territorial sea, and Commonwealth laws beyond. These arrangements inhibit a flexible functional approach under which responsibilities can be adjusted by reference to the requirements of particular fisheries. Fish do not respect the jurisdictional lines that man may draw.

The new arrangements will enable a single fishery to be regulated by the one set of laws, Commonwealth or State, as agreed between the Commonwealth and the State or States concerned, and they will provide for the establishment of Fisheries Joint Authorities:

- a *South-Eastern Fisheries Joint Authority* consisting of the Commonwealth Minister together with the appropriate Ministers of New South Wales, Victoria, South Australia and Tasmania;
- a *Northern Australian Fisheries Joint Authority* consisting of the Commonwealth Minister together with the appropriate Ministers of Queensland and the Northern Territory;
- a *Western Australian Fisheries Joint Authority* consisting of the Commonwealth Minister together with the appropriate Minister for Western Australia;
- a *Northern Territory Fisheries Joint Authority* consisting of the Commonwealth Minister and the appropriate Minister of the Northern Territory.

Flexibility is the keynote of the proposed legislation, and the Commonwealth will be able to make at any time an arrangement with a State or States for the establishment of further Fisheries Joint Authorities.

There will be complementary State legislation covering the area within the outer limit of the territorial sea.

In the event of disagreement within a Fisheries Joint Authority, the views of the Commonwealth Minister will prevail.

By agreement of the Governments concerned, a particular fishery may be assigned to the management of one of these Joint Authorities. Alternatively, it may be assigned to the administration of the Commonwealth alone or a State alone, if that is agreed.

These measures, devised in close collaboration between Commonwealth and State fisheries officers and legal advisers, have a practical objective—to provide a sound legal and administrative basis for a functional approach under which a particular fishery can be regulated by one authority under one set of laws, without regard to jurisdictional lines.

To give possible examples, the very important northern prawn fishery could be considered for management by the Northern Australian Fisheries Joint Authority; the Western Australia rock lobster fishery for management by that State; and the southern bluefin tuna fishery by the Commonwealth.

Under existing arrangements, foreign fishermen are regulated by Commonwealth law. This will continue to be the position. However, it has been agreed that the Commonwealth Minister is to be able to deem a boat brought to Australia from overseas for a limited period to participate in a joint venture under the control of an Australian company to be an 'Australian boat' for the purposes of the arrangements.

### Historic shipwrecks

The *Historic Shipwrecks Act* 1976 as presently drafted does not apply in relation to waters adjacent to the coast of any State until a proclamation has been made declaring that the Act so applies. In practice, proclamations have only been made where the adjacent State requests it. The result to date is that the Act applies to the waters adjacent to Western Australia, Queensland and New South Wales, as well as to waters adjacent to the Northern Territory.

Under the offshore settlement agreed to at the Premiers Conference the Act is to be amended so that it will expressly provide that it will only be applicable, or continue to be applicable, to waters adjacent to a State or the Northern Territory with the consent of that State or Territory. However, an exception is made for the special case of old Dutch shipwrecks lying off the coast of Western Australia.

These shipwrecks are the subject of a 1972 agreement between the Commonwealth and the Netherlands. They are protected at present by the *Historic Shipwrecks Act* 1976 and are to continue to remain under the Commonwealth Act until satisfactory alternative arrangements are made with Western Australia. Western Australia has already proposed discussions for such arrangements. Its State authorities have a fine record in taking steps to protect these shipwrecks and the relics from them, notwithstanding the legal difficulties illustrated by the case of *Robinson v. Western Australian Museum* (1977) 138 CLR 283.

### Great Barrier Reef Marine Park

The *Great Barrier Reef Marine Park Act* 1975 is to continue to apply to the whole of the Great Barrier Reef Region as defined in that Act, and the rights and title to be vested in the States in respect of the seabed of the territorial sea are to be subject to the operation of that Act.

In addition, the Commonwealth and Queensland have agreed to establish joint consultative arrangements for the management and preservation of the Region, which extends right into low-water mark along the Queensland coast and around Queensland islands in the area.

After consultation in accordance with these new arrangements, the Governor-General has since proclaimed the Capricornia Section as the first area to be declared to be part of the Great Barrier Reef Marine Park (*Commonwealth of Australia Gazette* of 21 October 1979).

### Other marine parks

The general division of responsibility is that parks or reserves within the outer limit of the territorial sea would be established under State legislation and parks or reserves beyond would be established by Commonwealth legislation with management responsibilities determined after consultation between the State concerned and the Commonwealth.

Where an area proposed as a marine park or reserve lies across the boundary of the territorial sea, the State concerned would establish that portion within the outer limit of the territorial sea under State legislation and the Commonwealth would legislate for that portion seawards of the outer limit of the territorial sea. Such arrangements would be subject to agreement between the State concerned and the Commonwealth on policy, planning and management for the whole area.

The only departure envisaged from this general division of responsibilities is where the Commonwealth and the State concerned agree that a proposed park within the territorial sea has international significance but where the State does not wish to legislate itself. In that event, the Commonwealth would legislate.

The need for consultation between the States and the Commonwealth in the establishment of marine parks and reserves has been recognised.

### Crimes at sea

The purpose of the agreed scheme of complementary Commonwealth-State legislation is to ensure that an appropriate body of Australian criminal laws—either State or Territory—is applicable to ships and to activities in offshore areas coming under Australian jurisdiction.

The legislation, much of which has already been passed, will deal with a situation that has required attention for some time.

Under the scheme State legislation will deal with offences in the territorial sea and offences committed on voyages between two ports in one State, or that began and ended at the same port in a State. The Commonwealth legislation deals with other cases, but in doing so it applies the criminal laws of a State or Territory with which the ship is connected by registration or otherwise. This should facilitate law enforcement and resolve, in a way that fits in with the federal system, the uncertainties and doubts that have existed.

The scheme will not affect the application of existing specific federal criminal offences, which will continue to be dealt with, as now, under the special Commonwealth legislation in question, for example the Customs Act. However, the application of State criminal laws under the scheme will help law enforcement generally on matters such as drug offences.

The Commonwealth legislation involved—the *Crimes at Sea Act* 1979—came into force on 1 November 1979, the date of the establishment of the Australian 200 nautical mile fishing zone. It applies to

offences committed on Australian ships which are on overseas, inter-state or Territory voyages. The Act also applies to offences on Australian ships in foreign ports, offences by Australian citizens on foreign ships where they are not members of the crew, and offences in offshore areas outside the territorial sea in relation to matters within Australian jurisdiction.

In certain limited cases the Act can also be applied to offences committed on foreign ships. The consent of the Commonwealth Attorney-General is required and is only to be given if the consent of the foreign State is obtained. This special jurisdiction would only be resorted to where necessary to ensure that serious criminal offences did not go unpunished for lack of an applicable law.

The scheme contains innovative provisions for the removal of proceedings from a Court in one part of Australia to a Court in another part of Australia where that would be expedient to avoid hardship on the accused or to promote a speedy trial.

### **Agreement on shipping and navigation**

The broad terms of the agreement, which deals primarily with the survey and issue of certificates to ships, the regulation of ships' crews, and the number and qualifications of those on board are:

- The States will be responsible for trading vessels except those proceeding on an interstate or an overseas voyage. For this purpose, 'trading vessels' are vessels, other than those in the categories listed below, that carry goods and passengers on a commercial basis. This category also includes tugs, barges, dredges and other marine service vessels.
- The Commonwealth will be responsible for trading vessels on an interstate or overseas voyage.
- The States will be responsible for all Australian commercial fishing vessels except those going on an overseas voyage. For this purpose a voyage of a Queensland based fishing vessel to Papua New Guinea would not be regarded as an overseas voyage. The safety standards of foreign fishing vessels in Australian waters will be a Commonwealth responsibility.
- The States will be responsible for all vessels whose operations are confined to rivers, lakes and other inland waterways. New South Wales will be responsible for all vessels operating on the River Murray upstream from the South Australian border.
- The States will be responsible for pleasure craft and for vessels used for pleasure on a hire and drive basis.
- The Commonwealth will be responsible for the navigation and marine aspects of offshore industry mobile units (mainly drilling vessels), but Navigation Act requirements may be displaced by

directions or conditions of instruments issued under the Petroleum (Submerged Lands) legislation.

- The Commonwealth will be responsible for offshore industry vessels (mainly supply craft), other than those confined to one State and its adjacent area. Petroleum (Submerged Lands) Act requirements will be capable of displacing the Commonwealth's Navigation Act requirements as in the case of mobile units. The procedure for determining whether an offshore industry vessel is confined to one State will depend on the owner making a declaration as to the intended operations of the vessel over a prescribed period. Unless a declaration is made and is accepted by the Minister for Transport following consultation with his State counterpart, the vessel will be under State law.

Simultaneously with the negotiation of this agreement the Commonwealth and States have developed a Uniform Shipping Laws Code which was published in the *Commonwealth of Australia Gazette* on 28 December 1979. This Code will be used as the basis for uniform Commonwealth, State and Northern Territory legislation for the survey and manning of commercial vessels, including fishing vessels, and will minimise problems that would otherwise occur in the implementation of the agreement on shipping and navigation. This is particularly necessary as the present laws of the States vary considerably due to their separate historical development.

Increasingly the regulation of shipping and navigation is being developed at the international level and considerable importance is placed on the need for Australian requirements to reflect the latest international standards. This is being done progressively in close consultation with the States. In implementing particular maritime treaties it may be desirable to depart from the shipping and navigation arrangements outlined above and the agreement with the States provides for this.

An example is the Convention on the International Regulations for the Prevention of Collisions at Sea 1974 which is being ratified by Australia following the enactment of the *Navigation Amendment Act* 1979. The Act enables State law to apply the international regulations to all ships in the territorial sea and internal waters and provides the necessary Commonwealth law to apply the international regulations to ships outside the 3 mile limit.

Summing up, the arrangements lay the basis for a complete resolution of shipping and navigation problems that have existed in Australia since federation.

In a separate development from the shipping and navigation agreement, the Commonwealth is preparing a Shipping Registration Bill to replace the provisions of the Merchant Shipping Act 1894 under which ships are registered in Australia as 'British ships'. Internationally Australia is obliged to fix the conditions for the grant of its nationality to ships. Although this is essentially a Commonwealth responsibility the

Government has kept in close touch with the States in the Marine and Ports Council on this matter.

### **Ship-sourced marine pollution**

The initial division of responsibilities between the Commonwealth and the States in the field of ship-sourced marine pollution came about in 1960 when the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, was accepted by Australia. Effect was given to the Convention by the enactment of Commonwealth legislation which applied to Australian ships outside the territorial sea, and similar legislation passed by the States which applied to all ships within the territorial sea.

Part VIIA of the *Navigation Act* 1912 includes provisions for intervention by Commonwealth authorities in cases of pollution or threatened pollution by oil from ships. This Part also imposes civil liability on shipowners whose ships carry oil in bulk as cargo. Similar legislation exists in some of the States.

In the interests of co-operative federalism, it has been agreed that the arrangements that existed before the High Court decision in the *Seas and Submerged Lands* case in 1975 should be continued.

It has also been agreed that the Commonwealth should prepare legislation which will implement the provisions of the International Conventions relating to Intervention on the High Seas in cases of Oil Pollution Casualties, 1969, and Civil Liability for Oil Pollution Damage, 1969. In implementing the latter Convention, a saving clause is to be inserted to allow States to legislate to implement certain aspects of the Convention if they wish to do so.

### **Northern Territory**

Following on the Government's action to bring the Northern Territory to the stage of responsible government with effect from 1 July 1978, representatives of the Northern Territory Government have participated in all offshore discussions. The Northern Territory is to be treated as a State for the purposes of the offshore constitutional settlement, and the legislation to implement the settlement will reflect this.

### **Jervis Bay Territory**

The Commonwealth Government and the New South Wales Government are at an advanced stage of negotiating mutually acceptable arrangements.

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